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THE LAW RELATING TO  
EXECUTORS AND ADMINISTRATORS

IN THE  
PROVINCE OF ONTARIO.

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BY  
R. E. KINGSFORD, M.A., LL.B.,  
OF TORONTO, BARRISTER.

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TORONTO :  
THE CARSWELL CO., LIMITED,  
1900.



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TORONTO.

## PREFACE.

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The law of Ontario relating to executors and administrators is like all other branches of the law of this Province founded upon that of England. The English law has been superseded to such an extent by local legislation that the more important matters with which executors and administrators have to deal are now regulated not by Imperial statutes but by Provincial enactments. For instance, the Devolution of Estates, Succession Duties, Investments by Trustees, the Management of Estates by Trusts Corporations are all provided for by Ontario Acts. The standard English text book is Williams on Executors, but it is not easy to find out from it or any other English text book what is law in Ontario and what is not. The present volume is an attempt to satisfy this want as far as concerns the law relating to executors and administrators.

I have had in view also in the arrangement of the book a contribution towards a codification of the law. It is possible by collating the statute law and the common law as laid down in text books and in reports of cases to compile a fairly complete statement of the law as it exists with regard to any given subject. Having this object in view the text has been arranged by paragraphs which are numbered. If these paragraphs correctly state the law and do not omit essential points, it is evident that some advance towards codification has been made. I would be glad to think that my efforts in this direction have been partially successful.

The reader will find nothing in these pages dealing with the mode of making a will or as to the mode of proving a

will. What I intend to supply, if possible, is such information as will state the course of procedure to be adopted in ordinary routine by an executor or an administrator in dealing with an estate.

The issue of this work has been delayed in order to include reference to the Acts of the Local Legislature of Ontario for 1900.

The case law referred to embraces both English and Canadian decisions. A selected leading case on which each paragraph of the text is based is given at the end of the paragraph for which it is the authority. If the paragraph includes, as it often does, more than one proposition, the case stated ought to put the reader in the way of tracing other cases which will verify a statement made in the paragraph to which the case cited does not directly apply.

I have been fortunate in obtaining the permission of Mr. Harry Vigeon, of Toronto, F.C.A., to print a lecture on executors' accounts delivered by him before the Institute of Chartered Accountants, Toronto. It will be of practical value, more especially as Mr. Vigeon has furnished a set of estate accounts as a model.

Appendices are added containing selected rules of Court, the authorized Government Regulations under the Succession Duty Act and one or two more important statutes. A table of cases and index are also supplied.

I hope the book will be useful to the Legal Profession, as well as to those who have the courage to undertake the thankless office of executor and trustee.

R. E. KINGSFORD.

Toronto, July, 1900.

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### THE SUCCESSION DUTIES ACT.

R. S. O. 1897, c. 24.

The only sections of this Act printed in the text are section 3—para. 572—and sub-sections (1) and (2) of section 4, and sub-section (8) of section 4—para. 571. All the rest of the Act is printed as an Appendix, page 461.

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# EXECUTORS AND ADMINISTRATORS.

## PART I.

### CREATION OF OFFICE.

#### CHAPTER I.

##### EXECUTORS.

**1.** As the term "executor" is at present accepted in the Province of Ontario, an executor may be defined to be "a person to whom the execution of a last will and testament of property is by the testator's appointment confided." In Ontario, under the Devolution of Estates' Act, real and personal estate are both now confided to the management of an executor.\*

Definition of term "Executor."

**2** Generally speaking, all persons who are capable of making wills, and some others besides, are capable of being made executors. Any doubt as to whether a corporation could be an executor in Ontario has been removed by Statute, as we shall presently see. An infant may be appointed an executor how young so ever he may be; but if an infant is appointed sole executor by

Who may be appointed executor.

\* The Surrogate Courts Act, R. S. O. 1897, c. 59, contains the following provision:

89. If any of the provisions of this Act shall be found to be inconsistent with the provisions of the Devolution of Estates Act, this Act shall be construed so as to conform in all respects with the true intent and meaning of the Devolution of Estates Act. Ont. Acts, 1890, c. 17, s. 20. (The Devolution of Estates Act will be found Part II. post.)

Construc-  
tion of this  
Act. Rev.  
Stat.c.127.

38 Geo. III. cap. 87, s. 6, he is altogether disqualified from exercising his office during his minority, and administration cum testamento annexo shall be granted to the guardian of such infant, or to such other person as the Court shall think fit, until such infant shall have attained the age of twenty-one years.

This Act only applies in case of an infant being sole executor, for if there are several executors and one of them is of full age no administration durante minore aetate ought to be granted, for he who is of full age may execute the will.

2 Black. Comm. 503; *In the Goods of Stewart*, L. R. 3 P. & D. 244.

*Cumming v. Landed Banking and Credit Co.*, 20 O. R. 382.

Married woman.

**3.** A married woman may be appointed an executrix, and may take upon herself the probate without the assent of her husband.

Persons attainted, or felons not disqualified.

**4.** There are few, or none, who, by law, are disabled on account of their crimes from being executors, and, therefore, it has always been held that persons attainted or outlawed may sue as executors, because they sue in auter droit and for the benefit of the persons deceased.

Ancient Authorities, Wms. 186.

Poverty or insolvency.

**5.** The Court cannot refuse, on account of his poverty or insolvency, to grant the probate of a will to a person appointed executor; but the High Court of Justice will restrain the insolvent or bankrupt executor and appoint a receiver, and if it is necessary to bring an action of law to recover part of the effects, where the action must be in the name of the executor, the Court will compel him to allow his name to be used or appoint an administrator ad litem; but if a person known by a testator to be a bankrupt or insolvent be appointed executor by him, such person cannot on the ground of insolvency alone be controlled by the appointment of a receiver. (See Chapter V. Revocation of Probate.)

*Stainton v. The Carron Co.*, 18 Beav. 146.

*Johnson v. McKenzie*, 20 O. R. 131; *Re Bush*, 19 O. R. 1.

**6.** Idiots and lunatics are incapable of being executors or administrators, and if an executor become non compos the Court may, on account of his natural disability, commit the administration to another.

Idiots and lunatics.

Old Cases, Wms. 188.

**7.** The appointment of an executor may be either express or constructive, in which latter case he is sometimes called executor according to the tenor; for although no executor be expressly nominated in the will by the word executor, yet, if by any word or circumlocution the testator recommend or commit to one or more the charge and office or the rights which appertain to an executor, it amounts to as much as constituting him or them to be executors.

Executor according to the tenor.

*In the Goods of Fraser*, L. R. 2 P. & D. 183.

*Young v. Paris*, 110 R. 597; *In the Goods of Briesman*, (1894) P. 260.

**8.** An executor may be appointed by necessary implication, as where a testator says, "I will that A. B. be my executor if C. D. will not"; in this case C. D. may be appointed if he please.

Executor by necessary implication.

**9.** There is a great distinction between the office of coadjutor or overseer and that of executor. The coadjutor or overseer has no power to administer or intermeddle, otherwise than to counsel, persuade and advise and, if necessary, apply to the Court. It is therefore material to enquire what words will appoint a coadjutor or overseer. If A. is made executor and B. coadjutor, without more he is not by this made a joint executor with A. If A. be made executor and the testator afterwards in his will expresses that B. shall administer also with him and in aid of him, here B. is an executor as well as A., and may prove the will as executor if A. refuses.

Coadjutor.

Ancient References, Wms. 194.



**10** Where the testator named his wife as executrix, and A. B. to assist her, it was held that A. B. might be executor according to the tenor.

*In the Goods of Brown*, 2 P. D. 110.

Executor  
by impli-  
cation.

**11.** Where a person had been expressly appointed executor for a limited purpose in a will, it was held that he was appointed general executor by a codicil by implication merely without express words.

*In the Goods of Aird*, 1 Hagg. 336.

Executors  
in several  
degrees.

**12.** An executor may be appointed solely or in conjunction with others, but in the latter case they are all considered in law in the light of an individual person. Likewise a testator may appoint several persons as executor in several degrees, as where he makes his wife executor; but if she will not or cannot be executor, then he makes his son executor; and if his son will not or cannot be executor, then he makes his brother, and so on; in which case the wife is said to be instituted executor in the first degree; B. is said to be substituted in the second degree; C. to be substituted in the third degree, and so on.

*In the Goods of Lane*, 33 L. J. P. M. & A. 185.

Substi-  
tutes when  
excluded.

**13.** If an instituted executor once accepts the office and afterwards dies intestate, the substitutes in what degree so ever are all excluded because the condition of law, if he will not or cannot be executor, was once accomplished by such acceptance of the instituted executor.

Ancient authority, Wms. 196.

**14.** Where a testator in his will appointed two persons as executors, and in a codicil named his wife "sole executrix of this my last will and testament," the Court held that the appointment of executors in the will was revoked.

*In the Goods of Lowe*, 3 Sw. & Tr. 478.

Appoint-  
ment bad  
for uncer-  
tainty.

**15.** An appointment of "A., as my executor, with any two of my sons," was held bad as to the sons for uncertainty.

*In the Goods of Baylis*, 2 Sw. & Tr. 613.

**16.** The many difficulties caused through the appointment of individuals to act as executors, and the loss in many cases incurred through individual carelessness or misconduct, have always been a source of danger to the public. This danger of late years has been met by the incorporation of Trust Companies. The first of the Ontario Trust Companies commenced business in 1882, and two others have since been incorporated and are carrying on business in Toronto. The object of these companies is to undertake and execute every kind of trust and financial agency. Among their other functions they undertake to act as trustee under the appointments of courts, corporations and private individuals.

**17.** They undertake also to act as executor, administrator, guardian, committee or referee, or in any other official or fiduciary capacity.

**18.** It is claimed for such companies that persons making use of them will secure the following advantages.

Firstly.—Absolute safety of the trust property.

Secondly.—Efficiency and economy in its administration.

Thirdly.—An unchanging and undying trustee.

Fourthly.—The assurance that the trust will be administered on certain well considered principles, and the avoidance of the serious risks, delays and inconveniences incident to the death of a trustee.

**19.** By section 8 R. S. O. 1897, c. 206, The Ontario Trusts Companies' Act, it is enacted as follows:

(1) Where a trust company incorporated under a special Act, or Appointed under The Ontario Companies' Act or the said chapter 157 of the Revised Statutes of Ontario, 1887, is authorized to execute the office of executor, administrator, trustee, receiver, assignee, guardian of a minor, or committee of a lunatic, then in case the Lieutenant-Governor in Council approves of such company being accepted by the High Court as a Trusts Company for the purposes

Rev. Stat.  
c. 191.

of such Court, the said Court, or any Judge thereof, and every other Court or Judge having authority to appoint such an officer, may, with the consent of the company, appoint such company to exercise any of the said offices in respect of any estate or person under the authority of such Court or Judge, or may grant to such company probate of any will in which such company is named an executor; but no company which has issued, or has authority to issue, debentures shall be approved as aforesaid.

Company  
so licensed  
may be  
sole trustee.  
(2) A trust company so approved of may be appointed to be a sole trustee, notwithstanding that, but for this Act, it would be necessary to appoint more than one trustee, and may also be appointed trustee jointly with another person.

Under  
deed, will,  
etc.  
(3) Such appointment may be made whether the trustee is required under the provisions of any deed, will or document creating a trust, or whether the appointment is under the provisions of the Act respecting Trustees and Executors and the Administration of Estates, or otherwise.

Rev. Stat.  
c. 129.

(4) Notwithstanding any rule or practice, or any provision of any Act requiring security, it shall not be necessary for the said company to give any security for the due performance of its duty as such executor, administrator, trustee, receiver, assignee, guardian, or committee, unless otherwise ordered.

(5) The Lieutenant-Governor in Council may revoke the approval given under this section, and no Court, or Judge, after notice of such revocation, shall appoint any such company to be an administrator, trustee, receiver, assignee, guardian, or committee, unless such company gives the like security for the due performance of its duty as would be required from a private person. Ont. Acts, 1897, c. 37, s. 8.

Liability  
of com-  
pany act-  
ing as  
trustee.

## **20. Section 9 of the same Act defines the liability of Trusts Companies as follows:—**

9. The liability of a trust company to persons interested in an estate held by the company as executor, administrator, trustee, receiver, assignee, guardian or committee, as aforesaid, shall be the same as if the estate had been held by any private person in the like capacity, and its powers shall be the same. Ont. Acts, 1897, c. 37, s. 9.

High Court  
of Justice  
adopts.

**21. Under the authority of this Act the High Court of Justice has approved of two Trust Companies as Trust Corporations for the purposes of the Court. Rule of Court 31 continues the former practice. The rules relating thereto will be found in an appendix.**

**22.** It will be noticed that the fourth sub-section of the Act dispenses with the necessity for giving security for the due performance of an executorship by a company. Security dispensed with.

**23.** The present state of the law, by which real as well as personal property devolves upon the personal representatives of the deceased, requires that parties petitioning for administration of an intestate's estate shall give security for double the value of both the real and personal property.\* This requirement greatly increases the risk and responsibility of individuals. This risk and responsibility are now rendered unnecessary if a Trust Company is made use of.† Security for double value must be furnished.

**24.** Guarantee companies are accepted as security under the following sections of R. S. O. 1897, c. 220: Securities of guarantee companies in Surrogate Court.

5. (1) The Lieutenant-Governor in Council may, by Order in Council, direct that the bond or policy of guarantee of any guarantee company named in such Order in Council, may, at the discretion of the Judge, be accepted, in whole or in part, in lieu of the security required by section 69 of the Surrogate Courts Act, and section 13 of the Act respecting Infants and the provisions of law therein contained with reference to the legal effect of such securities when given by individuals, and to the mode of proceeding thereon, shall apply to the security given by every such company. Rev. Stat. c. 59, 168.

(2) The interim receipt of the company may be accepted in lieu of the formal security, but the formal security shall be completed within one month. R. S. O. 1897, c. 220, s. 5 (Ont. Acts, 1893, c. 14, s. 1).

\*R. S. O. 1897, c. 59, s. 70 (s. 65, R. S. O. 1887, c. 50).

† Where letters of administration are issued to such company the material required is as follows:

1. Renunciation by parties entitled to administer in favour of a company.
2. Affidavit of search for will.
3. Affidavit of death of the deceased and place of abode.
4. Affidavit of the value of the property, both real and personal.
5. Petition to the Surrogate Court by the company.
6. Affidavit of manager of company to faithfully administer.
7. Affidavits as to search for will, death and place of abode, together with the affidavits as to the value of the property, to be made by persons having full knowledge of the facts.

Publication of  
Orders in  
Council.

6. Every Order in Council under the provisions of this Act shall, immediately after the making thereof, be published in the Ontario Gazette, and shall be laid before the Legislative Assembly within fifteen days after its first meeting thereafter. Ont. Acts, 1893, c. 14, s. 2.

Necessity  
for public  
inspection.

**25.** Under R. S. O. 1897, c. 206, the affairs and management of these trusts corporations are subject to investigation and inspection by any person appointed for that purpose by the High Court of Justice or the Ontario Government. The necessity for such an examination is obvious. These Trust Companies are, like all other financial companies, liable to mismanagement, and, while they are on the one hand unquestionably of great benefit to the public, on the other hand unless their investments and deposits are carefully scrutinized great loss and damage might be occasioned by unfortunate or improper investment. The public have only the financial guarantee of the liability of the shareholders of the corporation.

Extensive  
powers  
given.

**26.** The powers which may be given to Trust Companies are specified by the schedule to R. S. O. 1897, c. 206, as follows:—

To take, receive and hold all estates and property, real and personal, which may be granted, committed, transferred, or conveyed to them with their consent, upon any trust or trusts whatsoever (not contrary to law) at any time or times, by any person or persons, body or bodies corporate, or by any Court in the Province of Ontario.

To take and receive on deposit, upon such terms and for such remuneration as may be agreed upon, deeds, wills, policies of insurance, bonds, debentures, or other valuable papers or securities for money, jewellery, plate or other chattel property of any kind, and to guarantee the safe keeping of the same.

To act generally as attorney or agent for the transaction of business, the management of estates, the collection of loans, rents, interest, dividends, debts, mortgages, debentures, bonds, bills, notes, coupons and other securities for money.

To act as agent for the purpose of issuing or countersigning certificates of stock, bonds or other obligations of any association, or corporation, municipal or other.

To receive, invest and manage any sinking fund therefor on such terms as may be agreed upon.

To accept and execute the offices of executor, administrator, trustee, receiver, assignee, or of trustee for the benefit of creditors under any Act of the Legislature of the Province of Ontario; and of guardian of any minor's estate, or committee of any lunatic's estate; to accept the duty of and act generally in the winding up of estates, partnerships, companies and corporations.

To guarantee any investments made by them as agents or otherwise.

To sell, pledge, or mortgage any mortgage or other security or any other real or personal property held by the company from time to time, and to make and execute all requisite conveyances and assurances in respect thereof.

To make, enter into, deliver, accept and receive all deeds, conveyances, assurances, transfers, assignments, grants and contracts necessary to carry out the purposes of the said company, and to promote the objects and business of the said company;

And for all such services, duties and trusts to charge, collect and receive all proper remuneration, legal, usual and customary costs, charges and expenses. Ont. Acts, 1897, c. 37, Sched.

The exercise of these extensive powers should be carefully scrutinized by the Government. A periodical statement should be issued to the public by a government inspector, as in the case of banks and building societies.

**27.** The appointment of an executor may be either absolute or qualified. It may be absolute when he is constituted certainly, immediately, and without any restriction in regard to the testator's effects or limitation in point of time. It may be qualified by limitations as to the time or place wherein or the subject matter whereon the office is to be exercised; or the creation of the office may be conditional.

Appointment may be absolute or qualified.

**28.** It may be qualified by limitations in point of time, inasmuch as the time may be limited when the person appointed shall begin, or when he shall cease to be executor. Thus, if one appoint a man to be his executor at a certain time, as at the expiration of five years after his death; or, at an uncertain time, as upon the death or marriage of his son. Likewise a testator may appoint a person to be his executor for a particular

Limitations in point of time.

period of time only, as during the five years next after his decease; or during the minority of his son; or the widowhood of his wife; or until the death or marriage of his son.

Ancient Authorities, Wms. p. 199.

See *Courou v. Clarkson*, 3 Ch. Chas. 308.

Temporary  
adminis-  
tration  
granted.

**29.** In these cases if the testator does not appoint a person to act before the period limited for the commencement of the office on the one hand, or after the period limited for its expiration on the other; the Court may commit administration to another person until there be an executor, or after the executorship is ended. This administration will be one cum testamento annex.\*

Wms. p. 200.

Limita-  
tions as to  
place.

**30.** Further, an appointment may be limited in point of place, as thus: a testator may make A. his executor of his goods in one portion of Ontario; B. his executor for his goods in some other portion of Ontario, say the district of Muskoka, and so on. Or, what seems more rational and expedient, he may divide the duty when his property is in various countries.

Wms. p. 201.

Limitation  
as to sub-  
ject matter

**31.** Again, the power of an executor may be limited as to the subject matter upon which it is exercised. Thus a testator may make A. his executor for his plate and household stuff; B. for his sheep and cattle; C. for his leases and estates by extent, and D. for his debts due to him. So a person may be made executor for one particular thing only as touching such a statute or bond and no more, and the same will may contain the appointment of one executor for general and another for limited purposes; but though a testator may thus appoint separate executors for distinct parts of his property, and may divide their authority, yet quoad creditors they are all executors, and are considered as one executor, and may be sued as one executor.

Old Authorities, Wms. p. 201.

\* See next chapter as to administration de bonis non, and administration with will annexed.

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**32.** Lastly, the appointment may be conditional, and the condition may be either precedent or subsequent. Thus it may be that an executor gives security to pay the legacies and in general to perform the will before he acts as executor.

Old Authorities, Wms. p. 202.

**33.** An executor cannot assign the executorship. Formerly the interest vested in him by the will of the deceased might, generally speaking, be continued and kept alive by the will of the executor; so that if there was a sole executor of A., the executor of that executor is to all intents and purposes the executor and representative of the first testator.

Old Cases, Wms. p. 204.

**34.** By Statute of Ontario this state of the law is changed as follows:

The executor of any person appointed an executor under this section, shall not by virtue of such executorship be an executor of the estate of which his testator was appointed executor under this section, whether such person acted alone or was the last survivor of several executors. R. S. O. 1897, c. 51, s. 39 (5); Ont. Acts, 1896, c. 18, s. 4).

**35.** R. S. O. 1897, c. 59, s. 66 (Ont. Acts, 1896, c. 20, s. 3), is to the same effect. The result is that if an executor is appointed by the High Court or by a Surrogate Court, the executorship is not transmitted beyond the person so appointed. Nor does that person become executor of an estate whereof his testator was executor. Except in these cases the old rule, as stated in the last section, still exists.



## CHAPTER II.

## ADMINISTRATORS.

"Intestacy."

**36.** In case a party makes no testamentary disposition of his real or personal property he is said to die intestate.

2 Black. Comm. 494.

1. *Origin and Extent of Jurisdiction of Courts.*

The king was originally entitled to administration by prerogative.

Granted to lords of manors.

To church.

**37.** In ancient time when a man died without making any disposition of such of his goods as were testable, it is said that the king, who is *parens patriae*, and has the supreme care to provide for all his subjects, used to seize the goods of the intestate, to the intent that they should be preserved and disposed for the burial of the deceased, the payment of his debts, to advance his wife and children, if he had any, and if not, those of his blood. This prerogative the king continued to exercise for some time, by his own ministers of justice, and probably in the County Court, where matters of all kinds were determined. And it was granted as a franchise to many lords of manors and others, who had, until the passing of the Court of Probate Act, a prescriptive right to grant administration to their intestate tenants and suitors in their own Courts Baron and other Courts. Afterwards, the Crown, in favour of the Church, invested the prelates with this branch of the prerogative; for it was said, none could be found more fit to have such care and charge of the transitory goods of the deceased than the Ordinary who all his life had the care and charge of his soul. The goods of the intestate being thus vested in the Ordinary, as trustee to dispose of them in *pious usus*, it has been said that the clergy took to themselves (under the name of the church and poor) the whole residue of the deceased's estate, after the *partes rationabiles* of the wife and children had been deducted, without paying

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\* Ord

even his lawful debts and charges thereon, until by Stat. Westm. 2 (13 Edw. I. c. 19), it was enacted that the Ordinary\* should be bound to pay the debts of the intestate as far as his goods extended, in the same manner that executors were bound in case the deceased had left a will. However, in Snelling's case, it was resolved that if the Ordinary took the goods into possession, he was chargeable with the debts of the intestate at common law, and that the Stat. Westm. 2, was made in affirmance of the common law. But, though the Ordinary was (either at common law, or by force of this statute), liable to the creditors for their just and lawful demands, yet the residuum, after payment of debts, remained still in his hands, to be applied to whatever purposes the conscience of the Ordinary should approve. The flagrant abuses of which power occasioned the Legislature to interpose in order to prevent the Ordinaries from keeping any longer the administration in their own hands or those of their immediate dependents. And therefore the Statute of 31 Edw. III. St. I. cap. 2, provides "that in case where a man dieth intestate, the Ordinaries shall depute of the next and most lawful friends of the dead person intestate to administer his goods, which person so deputed shall have action to demand and recover as executors, the debts due to and dispend for the soul of the dead; and shall answer also in the King's Court to others to whom the said deceased was holden and bound in the same manner that executors shall answer. And they shall be accountable to the Ordinaries as executors be in the case of testament, as well as of the time past as the time to come."

2 Black. Comm. 495.

**38.** In Ontario, the Probate and Surrogate Courts date from 1793. In that year, a Court of Probate was instituted to take cognizance of all matters relating to the granting of probate and committing letters of administration. The governor was to preside and could appoint assessors. He was also empowered to commis-

Duty laid  
by Statute  
on Ordinary.

Abuses  
lead to in-  
terference  
of Parlia-  
ment.

Transfer  
of business  
to Surro-  
gate  
Courts.

\* Ordinarius—an overseer. Greek—Episcopos. Bishop.

33 Geo.  
III. c. 8.

12 Vict.  
c. 78.

R. S. O.  
1897, c. 59.

A Surro-  
gate Court  
to be in  
each  
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Testamen-  
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diction to  
be exer-  
cised by  
the Surro-  
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Courts.

sion a Surrogate Court in each of the four districts into which the Province was then divided. On 24th July, 1788, Lord Dorchester had established the four districts of Lunenburg, Mecklenburgh, Nassau and Hesse. These names had been changed, in 1792, to Eastern, Midland, Home and Western. In 1798 counties were formed, and the old districts were increased to Eastern, Johnstown, Midland, Home, Newcastle, Niagara, London, Western. In 1816 the Ottawa and Gore districts were created. In 1823 the District of Bathurst; 1837, the districts of Brock, Hastings, Simcoe and Talbot. In 1838 the districts of Colborne, Wellington and Huron were formed; District of Dalhousie in 1839. Finally, in 1849, as it was found that by the subdivision of districts their boundaries had become identical with the boundaries of counties, and it had become unnecessary to continue that mode of division, districts were abolished. Counties were then retained as the name for a territorial division for judicial as well as all other purposes. The Act came into effect 1st January, 1850. As the number of districts was increased, the Courts were from time to time also increased. The present Surrogate Courts are established in every county substantially for purposes defined by statute as follows:

3. In and for every county in Ontario there shall be a Court of Record to be called "The Surrogate Court" of each respective county, over which Court one Judge shall preside; and there also shall be a registrar, and such officers as may be necessary for the exercise of the jurisdiction to the said Courts belonging. R. S. O. 1897, c. 59, s. 3 (s. 3, R. S. O. 1887, c. 50).

**39. The jurisdiction and powers of the Surrogate Courts are defined as follows:**

17. All jurisdiction and authority, voluntary and contentious, in relation to matters and causes testamentary, and in relation to the granting or revoking probate of wills and letters of administration of the effects of deceased persons having estate or effects in Ontario, and all matters arising out of or connected with the grant or revocation of probate or administration, shall continue to be exercised in the name of Her Majesty, in the several Surrogate Courts; but this provision shall not be construed as depriving the High Court of jurisdiction in such matters. R. S. O. 1897, c. 59, s. 17 (s. 16, R. S. O. 1887, c. 50).

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1890, c. 17,

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1897, c. 59,  
17, s. 21.

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s. 18 of R.

**40. The Surrogate Courts have been endowed with full power, jurisdiction and authority.** Powers and jurisdiction of Surrogate Courts.

18. (1) To issue process and hold cognizance of all matters relative to the granting of probates, and committing letters of administration and to grant probate of wills and commit letters of administration of the property of persons dying intestate, having property in Ontario, and to revoke such probate of wills and letters of administration;

2. To hear and determine all questions, causes and suits in relation to the matters aforesaid, and to all matters and causes testamentary; and

3. Subject to the provisions herein contained, the Courts shall also have the same powers and the grants and orders of the said Courts shall have the same effect throughout all Ontario, and in relation to the personal estate of deceased persons, as the former Court of Probate for Upper Canada, and its grants and orders respectively had in relation to those matters and to causes testamentary within its jurisdiction, and to those effects of deceased persons dying possessed of goods and chattels over \$20.00 in value in two or more counties in Upper Canada; and all duties which by statute or otherwise were imposed on or exercised by the said Court of Probate or the Judge thereof in respect to probates, administrations and matters and causes testamentary, and the appointment of guardians and otherwise, shall be performed by the said several Surrogate Courts and the Judges thereof, within their respective jurisdictions; but no actions for legacies or for the distribution of residues shall be entertained by any of the said Surrogate Courts. R. S. O. 1897, c. 59, s. 18 (s. 17 R. S. O. 1887, c. 50; Ont. Acts, 1890, c. 17, ss. 1, 2).

19. (1) The grant of probate or letters of administration shall belong to the Surrogate Court for the county in which the testator or intestate had at the time of his death his fixed place of abode. To what particular Court the grant of probate or administration shall belong.

(2) If the testator or intestate had no fixed place of abode in, or resided out of Ontario at the time of his death, the grant may be made by the Surrogate Court for any county in which the testator or intestate had property at the time of his death.

(3) In other cases the grant of probate or letters of administration shall belong to the Surrogate Court of any county. R. S. O. 1897, c. 59, s. 19 (s. 18 R. S. O. 1887, c. 50; Ont. Acts, 1890, c. 17, s. 2).

21. Probate or letters of administration by whatever Court granted shall, unless revoked, have effect over the property of the deceased in all parts of Ontario, subject to limitation under section 61 of this Act or otherwise. Effect of probate and administration. R. S. O. 1897, c. 59, s. 21 (s.-s. 4 of s. 18 of R. S. O. 1887, c. 50; s. 3 Ont. Acts, 1890, c. 17).

Adminis-  
tration  
limited to  
personal  
estate.

Section 61 of R. S. O. 1897, c. 59 (s. 58, R. S. O. 1887, c. 50), is as follows: A person entitled to take out letters of administration to the estate of a deceased person shall be entitled to take out such letters limited to the personal estate of the deceased, exclusive of the real estate.

In cases of  
contention,  
the matter  
may, by  
consent, be  
referred  
for adjudica-  
tion to the  
High Court.

**41. The jurisdiction of the High Court of Justice as to probate and administration is laid down in the three following sections:**

33. In every case in which there is contention as to the grant of probate or administration, and the parties in such case thereto agree, the contention shall be referred to and determined by the High Court on a case to be prepared, and the Surrogate Court having jurisdiction in the matter shall not grant probate or administration until the contention is terminated, and disposed of by judgment or otherwise. R. S. O. 1897, c. 59, s. 33 (s. 30, R. S. O. 1887, c. 50).

In certain  
cases of  
contention,  
matter to be  
removed  
into High  
Court.

34. (1) Any cause or proceeding in the Surrogate Courts in which any contention arises as to the grant of probate or administration, or in which any disputed question may be raised (as to law or facts), relating to matters and causes testamentary, shall be removable by any party to the cause or proceeding into the High Court by order of a Judge of the said Court, to be obtained on a summary application, supported by affidavit, of which reasonable notice shall be given to the other parties concerned.

Terms as  
to costs.

(2) The Judge making the order may impose such terms as to payment or security for costs or otherwise as to him seems fit; but no cause or proceeding shall be so removed unless it is of such a nature and of such importance as to render it proper that the same should be withdrawn from the jurisdiction of the Surrogate Court and disposed of by the High Court, nor unless the property of the deceased exceeds \$2,000 in value. R. S. O. 1897, c. 59, s. 34 (s. 31, R. S. O. 1887, c. 50; Ont. Acts, 1892, c. 17, s. 5).

Certain  
cases not  
to be so  
removed.

35. Upon any cause or proceeding being so removed, the High Court shall have full power to determine the same, and may cause any question of fact arising therein to be tried by a jury, and otherwise deal with the same as with any cause or claim originally entered in the said Court; and the final order or judgment made by the said Court in any cause or proceeding removed as aforesaid, shall, for the guidance of the Surrogate Court, be transmitted by the Surrogate clerk to the registrar of the Surrogate Court from which the cause or proceeding was removed. R. S. O. 1897, c. 59, s. 35 (s. 32, R. S. O. 1887, c. 50).

Transmis-  
sion of  
final order  
to Surro-  
gate Court

**42.** The High Court has jurisdiction also to try the validity of last wills and testaments, and also to appoint administrators pendente lite, and would have the power to revoke any appointment so made.

**38.** The High Court shall have jurisdiction, to try the validity of last wills and testaments, whether the same respect real or personal estate; and whether probate of the will has been granted or not, and to pronounce such wills and testaments to be void for fraud and undue influence or otherwise, in the same manner and to the same extent as the Court has jurisdiction to try the validity of deeds and other instruments. R. S. O. 1897, c. 51, s. 38 (Ont. Acts, 1895, c. 12, s. 34).

**43.** No jurisdiction exists in the High Court of Justice nor has any been conferred upon it to revoke the grant by a Surrogate Court of letters of administration, except under authority referred to in chapter V., post.

*McPherson v. Irvine*, 26 O. R. 438.

*In re Ivory, Hawkin v. Turner*, 10 Ch. D. 372.

**44.** As to estates of small value, jurisdiction is conferred on the Surrogate Courts as follows:

**74.** Where the whole estate and effects, real and personal, of any testator or intestate do not exceed in value the sum of \$400, his widow, or one or more of his children or next of kin, or his executors, or any trustee, or duly authorized solicitor or agent of such widow, child, next of kin or executors, may apply to the Judge of the Surrogate Court of the proper county, and the registrar of the said Court shall fill up the usual papers required by the Surrogate Court to lead to a grant of probate of the will of the testator or letters of administration of the estate and effects of the said testator or intestate, and shall swear the applicant and attest the execution of the administration bond according to the practice of the said Court, and shall then transmit a notice of the application by post to the Surrogate Clerk at Toronto; and the registrar, on obtaining the approval or order of the Judge of the Surrogate Court, shall in due course make out and seal the probate of the will of the testator, or letters of administration of the estate and effects of the testator or intestate to be delivered to the party so applying for the same, without the payment of any fee for the same, save as is provided by section 76 of this Act. R. S. O. 1897, c. 59, s. 74 (s. 67, J. S. O. 1887, c. 50; Ont. Acts, 1890, c. 17, s. 17).

**75.** The Judge of the Surrogate Court may require such proof as he may think sufficient to establish the identity and relationship

Judge to be satisfied that the value of the estate is less than \$400.

of the applicant; and if the Judge has reason to believe that the whole property of which the testator or intestate died possessed exceeds in value the sum of \$400, he shall refuse to proceed with the application under the last preceding section until he is satisfied as to the real value thereof. R. S. O. 1897 c. 59, s. 75; Ont. Acts, 1890, c. 17, s. 18.

76. Such fees as the Lieutenant-Governor in Council may think proper, shall be payable to the Judges and Registrars of the Surrogate Courts, on proceedings under sections 74 and 75, but the total amount for all proceedings and services to be charged to applicants shall not in any one case exceed the sum of \$2. R. S. O. 1897, c. 59, s. 76 (s. 69 R. S. O. 1887, c. 50).

Scale of fees.

77. Where the whole estate of the testator or intestate exceeds in value the sum of \$400, but does not exceed \$1,000, the fees payable to the registrar and to the Judge on proceedings under this Act, in non-contentious cases, shall be one-half of the fees payable on the 5th day of May, 1894, in the case of any estate not exceeding in value the sum of \$1,000. Ont. Acts, 1894, c. 22, s. 2.

Appeals.

**45.** Appeals from the Surrogate Courts are limited as follows:

Persons considering themselves aggrieved by any judgment, etc., may appeal to the Court of Appeal.

36. Any person considering himself aggrieved by any order, sentence or judgment of a Surrogate Court, or being dissatisfied with the determination of the Judge thereof in point of law in any matter or cause under this Act, may, within fifteen days next after such order, sentence, judgment or determination, appeal therefrom to a Divisional Court of the High Court, in the manner and subject to the regulations provided for by the rules and orders respecting the Surrogate Courts heretofore in force or by rules or orders made under this Act; and the said Court shall hear and determine such appeal; but no such appeal shall be had or lie unless the value of the property, goods, chattels, rights or credits to be affected by such order, sentence, judgment or determination exceeds \$200. R. S. O. 1897, c. 59, s. 36 (s. 33 R. S. O. 1887, c. 50; Ont. Acts, 1890, c. 17, s. 6; ib. 1895, c. 13, s. 45).

Appeals not to lie in certain cases.

Approval of accounts by Surrogate Judge to be binding in High Court.

72. Where an executor or administrator has filed in the proper Surrogate Court an account of his dealings with the estate of which he is executor or administrator, and the Judge has approved thereof, in whole or in part, if the executor or administrator is subsequently required to pass his accounts in the High Court, such approval, except so far as mistake or fraud is shown, shall be binding upon any person who was notified of the proceedings taken before the Surrogate Judge, or who was present or represented thereat, and upon every one claiming under any such person. R. S. O. 1897, c. 59, s. 72 (Ont. Acts, 1890, c. 20, s. 5).

## 2. Administration Generally.

**46.** The Stat. 31 Edw. III. Stat. 1, cap. 11, provides that in cases of intestacy "the Ordinaries shall depute of the next and most lawful friends of the dead person intestate to administer his goods." The power of the Ecclesiastical Judge was a little more enlarged by the Statute 21 Hen. VIII. cap. 5, s. 3, which provides that in case any person die intestate, or that executors named in any testament refuse to prove it, the Ordinary shall grant administration "to the widow of the deceased, or to the next of his kin, or to both, as by the discretion of the same ordinary shall be thought good." And the same section goes on to enact that "where divers persons claim the administration as next of kin which be equal in degree of kindred to the testator or person deceased, and where any person only desireth the administration as next of kin, where indeed divers persons be in equality of kindred as is aforesaid, that in every such case the Ordinary to be at his election and liberty to accept any one or more making request where divers do require the administration."

Course of  
adminis-  
tration as  
prescribed  
by Statute.

31 Edw.  
III., Stat.  
1, c. 11.

21 Hen.  
VIII., c.  
5, s. 3.

**47.** The right of the husband to be administrator of his wife belongs to him exclusively of all other persons, and the Surrogate Judge has no power or election to grant it to any other.\* It is expressly confirmed by the

Right of  
husband.

\* See, however, R. S. O. 1897, c. 59, s. 59 (s. 56 R. S. O. 1887, c. 50; Ont. Acts 1890, c. 17 s. 15), which is as follows:

Where a person has died wholly intestate as to his property, General or leaving a will affecting property, but without having appointed power as an executor thereof willing and competent to take probate; or where the executor was at the time of the death of such person resident out of Ontario, and it appears to the Court to be necessary or convenient in such case, by reason of the insolvency of the estate of the deceased, or other special circumstances, to appoint some person to be the administrator of the property of the deceased, or of any part of such property, other than the person who, if this Act had not been passed, would by law have been entitled to a grant of administration to such property, it shall not be obligatory upon the Court to grant administration of the property of such deceased person to the person who if this section had not been enacted would by law have been entitled to a grant thereof, but the Court in its discretion may appoint such person as the Court



Statute 29 Car. II. c. 3, which gives the husband the right notwithstanding the provisions of Statute of Distributions, 22 & 23 Car. II. cap. 10.

*Humphrey v. Bullen*, 1 Atk. 459.

Right of widow.

**48.** Next as to the right of the widow. The Statute 21 Hen. VIII. cap. 5, s. 3, directs that the Ordinary shall, in case of intestacy or refusal to prove the will, grant administration to the widow or next of kin, or to both, at his discretion. In modern practice, the election of the Judge is in favour of the widow under ordinary circumstances. The Court has always held that administration may be granted to the next of kin, and the widow be set aside upon good cause. For instance, if she has barred herself of all interest in her husband's estate by her marriage settlement; or where she is a lunatic; or where she has eloped from her husband; or has lived separate from her husband. But the circumstance of the wife having married again is no valid objection. But if the deceased left children, one of whom supported by the rest applies for administration, the second marriage might induce the Court to prefer the child, and I think in every case it should.

*Webb v. Needham*, 1 Add. 494.

Next of kin.

**49.** Who are the next and most lawful friends or next of kin is prescribed by the Statute of Distributions, 22 & 23 Car. II. cap. 10, which is in force in Ontario.

See Black. Comm. Vol. II. 203.

Right to. *Chard v. Rae*, 18 O. R. 232.

Sole administration preferred.

**50.** The Court prefers *caeteris paribus*, a sole to joint administration, because it is much better for the estate and more convenient for the claimants on it, since the administrators must join and be joined in every act,

thinks fit, upon his giving such security (if any) as the Court directs, and every such administration may be as limited as the Court thinks fit.

This section is copied from Imp. Act 20 & 21 Vict. cap. 77 (Court of Probate Act, 1857,) s. 73.

A husband may lose this right if marriage dissolved on ground of adultery and desertion. See note Wms. p. 349.

and the Court never forces a joint administration upon unwilling parties.

*In the Goods of Nayler*, 2 Robert. 409.

**51.** When a person entitled to administration is resident in a foreign country, the Court will expect that due diligence will be used to give him notice of the application, before it will grant administration to another person.

Person entitled, resident in a foreign country.

*Goddard v. Cressoiner*, 3 Phil. 637.

**52.** In case of a foreigner dying intestate in Ontario, if no question is raised the Court will grant administration to the person entitled to the effects of the deceased according to the law of his own country. If the legal title be disputed, the question will depend on the fact whether the deceased was domiciled within the British dominions or only had a temporary residence there.

Administration to estate of foreigner.

*In the Goods of Beggia*, 1 Add. 340.

**53.** If the intestate was domiciled in a foreign country or within the Queen's dominions out of Ontario, administration must be taken out here as well as in the country of domicile. But if he left no assets in this country, the Court of Probate has no jurisdiction to make any grant of administration in respect of his estate.

Intestate domiciled in a foreign country.

*Attorney-General v. Bourens*, 4 M. & W. 193; *In the Goods of Tucker*, 3 Sw. & Tr. 585.

**54.** In a case of complete intestacy if the Ordinary would not grant administration as the statutes appointed, a mandamus lay to compel him. It is a good return to such a mandamus that a controversy is depending in the Court, whether there is a will or not.

Mandamus to compel administration.

*Rea v. Hay*, 1 W. Bl. 640.

**55.** There is a distinction between a person appointed executor and one entitled to administration as next of kin, with respect to the obligatory consequences of administering the property of the deceased. An executor cannot after an act of administration refuse to accept the executorship and take probate; but although a next of kin may have intermeddled with the effects

Distinction between executor and administrator as to obligation to administer.

and made himself liable as executor de son tort, he cannot be compelled by the Court to take upon himself the office of administrator.

*Long v. Symes*, 3 Hagg. 774; *In the Goods of Fell*, 2 Sw. & Tr. 126.

Attorney  
of next of  
kin.

**56.** Administration may be granted to the attorney of all the next of kin, provided they reside out of the country.

*In the Goods of Elderton*, 4 Hagg. 210.

Form of  
power.

**57.** Where letters of administration are granted to persons under a power of attorney from the party entitled to the representation, the letters express that they are granted "for the use and benefit" of those entitled. But these words do not exclude the claim of other persons to share in the property.

*Anstruther v. Palmer*, 2 Sim. 5.

Grant is  
sued by  
Attorney.

**58.** Where a person is authorized by a simple power of attorney to take out administration, the Court ought to decree him such administration as it would have granted to the person who conferred the power, if he had applied for it himself.

*In the Goods of Goldborough*, 1 Sw. & Tr. 295.

Creditor  
may ad-  
minister,  
when.

**59.** If none of the next of kin will take out administration, a creditor may do it on the ground that he cannot pay his debts until representation to the deceased is made. And therefore administration is only granted to him failing every representative.

*Elme v. DaCosta*, 1 Phillim. 177.

Procedure  
on applica-  
tion of  
creditor.

**60.** The necessary course when a creditor applies for administration is to issue a citation for the next of kin in particular, and all others in general, to accept or refuse letters of administration, or show cause why administration ought not to be granted to such creditor. The next of kin may appear to the citation and will then be preferred to the creditor. But if the next of kin has unduly delayed to take out administration (as where six

months elapse from the death of the intestate), the creditor will be allowed his costs.

*In the Goods of Barker*, 1 Curt. 592.

**61.** The following statutory provisions relate to this part of the subject:

41. In case application is made for letters of administration by a person not entitled to the same as next of kin to the deceased, the next of kin, or others having or pretending interest in the property of the deceased resident in Ontario, shall be cited or summoned to see the proceedings, and to show cause why the administration should not be granted to the person applying therefor; and if neither the next of kin nor any person of the kindred of the deceased happens to reside in Ontario, then a copy of the citation or summons shall be served or published in such manner as may be provided for by any rules or orders in that behalf. R. S. O. 1897, c. 59, s. 41 (s. 38, R. S. O. 1887, c. 59; Ont. Acts, 1890, c. 17, s. 10).

42. If the next of kin, usually residing in Ontario and regularly entitled to administer, happens to be absent from Ontario, the Surrogate Court having jurisdiction in the matter may, in its discretion, grant a temporary administration, and appoint the applicant, or such other person as the Court thinks fit, to be administrator of the property of the deceased person for a limited time, or to be revoked upon the return of such next of kin as aforesaid. R. S. O. c. 59, s. 42 (s. 39, R. S. O. 1887, c. 59; Ont. Acts, 1890, c. 17, s. 11).

43. The administrator so appointed shall give such security as the Court directs, and shall have all the rights and powers of a general administrator, and shall be subject to the immediate control of the Court. R. S. O. 1897, c. 59, s. 43 (s. 40, R. S. O. 1887, c. 59).

60. After a grant of administration no person shall have power to sue or prosecute any action, or otherwise act as executor of the deceased as to the property comprised in or affected by such grant of administration, until such administration has been recalled or revoked. R. S. O. 1897, c. 59, s. 60 (s. 57, R. S. O. 1887, c. 59; Ont. Acts, 1890, c. 17, s. 16).

61. A person entitled to take out letters of administration to the estate of a deceased person shall be entitled to take out such letters limited to the personal estate of the deceased, exclusive of the real estate. R. S. O. 1897, c. 59, s. 61 (s. 58, R. S. O. 1887, c. 59).

**62.** Before granting letters of administration to a creditor, the Court always required an affidavit as to the amount of the property to be administered, unless where

there has been a personal service of the usual citation on the parties entitled to the administration in the first instance.

*Briggs v. Roope*, 29 L. J. P. & M. 96.

**63.** Although before administration granted a creditor cannot deny an interest or oppose a will, yet when he has obtained administration, he has the right to maintain it against the executor of the next of kin, and it is not to be revoked on mere suggestion.

*Menzies v. Pulbrook*, 2 Curt. 821.

In default  
of next of  
kin or of  
creditors.

**64.** For want as well of creditors as of next of kin desirous to take out administration, the Court may grant it to any person at its discretion; or it may ex officio grant to a stranger letters ad colligendum bona defuncti to gather up the goods of the deceased.

*Davis v. Chanter*, 14 Sim. 212.

Incapacity  
to take  
grant.

**65.** A widow or next of kin who would otherwise be entitled, may be incapable of the office of administrator on account of some legal disqualification.

Incapaci-  
ties.

**66.** The incapacities of an administrator not only comprise those persons who have been already mentioned as disqualified for the office of executor, but extend to attainder or treason, or felony or other lawful disability, outlawry and bankruptcy, not alienage.

Old Authorities, Wms. p. 387.

Minor.

**67.** If the next of kin be a minor, administration must be granted to another person during his minority.

Married  
woman.

**68.** Administration may be granted to a married woman.

*Ibid.* 388.

Adminis-  
tration,  
how  
granted.

**69.** Administration is generally granted by writing under seal. It may also be committed by entry in the registry without letters of administration under the seal, but it cannot be granted by parol.

*Ibid.* 389.

**70.** Where the party entitled to grant of administration has renounced, such renunciation may be retracted before the administration has passed the seal. Retracting renunciation.

*West v. Wilby*, 3 Phillim. 379.

**71.** Administration in favour of the Crown may be granted to the Attorney-General for Ontario under the Ontario Act respecting the Administration by the Crown of the Estates of Intestates.\* Administration by Crown.

\* This Act is printed as an Appendix.

**72.** The mode of obtaining grant of administration or probate of will is a branch of practice which in an uncontested case is a simple matter. The requirements of the statute are as follows:

37. Unless otherwise provided by this Act, or by the rules or orders respecting Surrogate Courts, heretofore in force, or hereafter to be made under this Act, the practice of the Surrogate Court shall, so far as the circumstances of the case will admit, be according to the practice in Her Majesty's Court of Probate in England, as it stood on the 5th day of December, 1859. R. S. O. 1897, c. 59, s. 37 (s. 34, R. S. O. 1887, c. 50). Practice of the Courts, general rule as to.

38. On every application to a Surrogate Court for probate of will or letters of administration, where the testator or intestate was resident in Ontario at the time of his death, the place of abode of the testator or intestate at the time of his death shall be made to appear by affidavit of the person or some one of the persons making the application; and thereupon and upon proof of the will or in case of intestacy, upon proof that the deceased died intestate, probate of the will or letters of administration (as the case may be) may be granted under the seal of the Surrogate Court to which the application has been so made; and the probate or letters of administration shall have effect over the property of the deceased in all parts of Ontario, subject to limitation under section 61 of this Act or otherwise. R. S. O. 1897, c. 59, s. 38 (s. 35, R. S. O. 1887, c. 50; Ont. Acts, 1890, c. 17, s. 7). Proof, etc., requisite for obtaining grant of probate of administration, where deceased resided in Ontario. Effect of probate or administration.

39. On every application or probate of a will or letters of administration where the testator or intestate had no fixed place of abode in or resided out of Ontario at the time of his death, the same shall be made to appear by affidavit of the person or some one of the persons applying for the probate or administration, and that the deceased died leaving personal or real property within the county in the Surrogate Court of which the application is made; or leaving no personal or real property in Ontario, as the case may be; When testator, etc., had no fixed place of abode in, or resided out of Ontario, upon what proof pro-

bate or administration to be granted.

and that notice of the application has been published at least three times successively in the Ontario Gazette; and thereupon and upon proof of the will, or in case of intestacy, upon proof that the deceased died intestate, probate of the will or letters of administration, as the case may be, may be granted under the seal of such Surrogate Court; and the probate or letters of administration shall have effect over the property of the deceased in all parts of Ontario, subject to limitation under section 61 of this Act or otherwise. R. S. O. 1897, c. 59, s. 39 (s. 36, R. S. O. 1887, c. 50; Ont. Acts, 1890, c. 17, s. 8).

Affidavit grounding application for grant to be conclusive for exercise of jurisdiction if acted on.

40. The affidavit as to the place of abode and property of a testator or intestate under the next preceding two sections, for the purpose of giving a particular Court jurisdiction, shall be conclusive for the purpose of authorizing the exercise of such jurisdiction; and no grant of probate or administration shall be liable to be recalled, revoked or otherwise impeached by reason that the testator or intestate had no fixed place of abode within the particular county at the time of his death, or had not property therein at the time of his death; and every probate and administration granted by a Surrogate Court shall effectually discharge and protect all persons paying to or dealing with any executor or administrator thereunder, notwithstanding the want of or defect in such affidavit as is hereby required; but in case it is made to appear to the Judge of a Surrogate Court, before whom any matter is pending under this Act that the place of abode of the testator or intestate or the situation of his property, has not been correctly stated in the affidavit, the Judge may stay all further proceedings, and make such order as to the costs of the proceedings before him as he thinks just. R. S. O. 1897, c. 59, s. 40 (s. 37, R. S. O. 1887, c. 50; Ont. Acts, 1890, c. 17, s. 9).

But the Judge may stay proceedings in case of incorrect statement.

### 3. *Administration on Failure of Appointment of Executor.*

Death quasi intestatus.

**73.** It often happens that a deceased, although he makes a will, appoints no executor or else the appointment fails. In either of which events he is said to die quasi intestatus.

Old Authority, Wms. p. 399.

Failure of appointment of executor.

**74.** The appointment of executor fails: (1) Where the person appointed refuses to act. (2) Where the person appointed dies before the testator, or before he has proved the will, or where from any cause he cannot act. (3) Where the executor dies intestate after having proved the will, but before he had administered all the property

of the deceased. In all these cases, as well as where no executor is appointed, the Court must grant an administration, which is called administration with the will annexed, and in the last instance it is also called administration de bonis non.

*Ibid.*

*Ingalls v. Reid*, 17 U. C. C. P. 500.

**75.** The office of administrator differs little from that of an executor, and it is plain that the will to which it is annexed must be similarly proved, as though probate of it were taken by an executor.

2 Black. Comm. 535.

Can an administrator *de bonis* now call in question the administration of his predecessor? *Tiffany v. Thompson*, 9 Chy. 244.

**76.** Many of the cases above contemplated are not within the Statute of Administration, 21 Hen. VIII. cap. 5, which provides only for intestacy and the refusal of an appointed executor.\* Consequently the Court is left to the exercise of its discretion in the choice of an administrator according to its own practice, and no person has such a legal right to preference as can be enforced by application to the common law Courts.

*In the Goods of Ewing*, 6 P. D. 19.

**77.** The rule of practice where the grant of administration is not within the statute is to consider which of the claimants has the greatest interest in the effects of the deceased, and decree the administration accordingly, if there are no peculiar circumstances. So, in all cases where no executor is appointed, or where the appointed executor fails to represent the testator, the residuary legatee, if there be one, is preferred to the next of kin, and is entitled to administration cum testamento annexo.

*In the goods of Gill*, 1 Hagg. 341.

See *Kearney v. McMinn*, 3 S. C. R. 332.

\*Paragraph 48 above.



**78.** The residuary legatee, even where there is no present prospect of any residue, is entitled to administration in preference as well to the next of kin as also to legatees and annuitants. So he is entitled, though only residuary legatee in trust. But the next of kin has a *prima facie* right, and therefore where a party claims as or derivatively from the residue legatee, the burden of proof lies on such party.

*Atkinson v. Barnard*, 2 Phillim. 316.

Representative  
of residu-  
ary legatee

**79** Where the residuary legatee survives the testator and has a beneficial interest, his representative has the same right to administration with the will annexed as the residuary legatee himself, and is therefore entitled to administration in preference to the next of kin or the legatees. Thus if an executor be also residuary legatee, and die before probate or intestate, before he has fully administered the estate, administration with the will annexed shall be granted to his personal representative, and not to the next of kin or the first testator.

*Wetdrill v. Wright*, 2 Phillim. 243.

Court not  
bound to  
grant to  
residuary  
legatee.

**80.** Although it was the practice of the spiritual Court to grant administration to the residuary legatee, yet the Court was not bound to grant it to him.

*In the Goods of Ewing*, 6 P. D. 19, 25.

If residu-  
ary legatee  
declines.

**81.** If the residuary legatee declines it is usual to grant administration cum testamento annexo to the next of kin; but it is clear that when he has no interest he may be excluded, and the administration granted to a person who has an interest in the effects, for instance, a creditor.

*West v. Wilby*, 3 Phillim. 381.

Creditor.

**82.** If an executor fails to take probate and there is no residuary legatee, the next of kin are entitled to administration with the will annexed. If the next of kin decline it such administration may be granted to a lega-

tee or to a creditor; but notice must be given of the application of the legatee or creditor to the next of kin.

*Kooysra v. Buyskes*, 3 Phillim. 531.

**83.** In all these cases where a party has a prior title to a grant, he must be cited before administration is committed to any other person.

Citation of prior party required.

*In the Goods of Barker*, 1 Curt. 502.

**84.** When the executor resides out of the jurisdiction administration with the will annexed may be granted to another person under a letter of attorney from the executor for his use and benefit. A will thus proved by the attorney of an executor is the same thing as if actually proved by himself. The letter of attorney is revocable, and when the executor revokes it and desires probate the Court is bound to grant it to him.

Letter of attorney to take administration.

*In the Goods of Barker* (1891) P. 251.

**85.** On the death of the executor the letters of administration cease to be of any force, and therefore the administrator cannot make a good title if he sells leasehold property of the deceased, unless he can warrant to the purchaser that the executor is alive.

Effect of death of executor on letter of attorney.

*Suercrop v. Day*, 8 A. & E. 624.

**86.** If a sole executor happens to die without having proved the will,\* the executorship is not transmissible to his executor but is wholly determined, and administration with the will annexed must be committed to the person entitled according to the above rules.

Death of sole executor.

*Wankford v. Wankford*, 1 Salk. 308.

**87.** When the administration is granted under such circumstances, although the executor may have administered in part by disposing of the testator's effects, yet the administration shall not be de bonis non administratis but an immediate administration.

Executorship in such case.

*Wankford v. Wankford*, *ut sup.*

\*See paragraph 33 ante, which relates to the case where the first executor has proved the will.

Death of  
one of sev-  
eral execu-  
tors.

**88.** If one of several executors dies before or after probate, no interest is transmissible to his own executor, but the whole representation survives to his companion.

*In the Goods of Smith*, 3 Curt. 31.

**89.** The following statutory rules regulate the granting of administration with will annexed:

Adminis-  
tration  
with the  
will an-  
nexed,  
practice as  
to, etc.

57. Where administration is granted with the will annexed, a bond shall (unless it is otherwise provided by law) be given to the Judge of the Court as in other cases and with like effect and unless otherwise provided for by this Act, or the Rules or Orders relating to Surrogate Courts from time to time in force, the practice and procedure in respect to such administrations and in respect to such bonds, and the assignment thereof shall, so far as the circumstances of the case will admit, be according to the practice in such cases in Her Majesty's Court of Probate in England, on the 5th day of December, 1859. R. S. O. 1897, c. 59, s. 57 (s. 54, R. S. O. 1887, c. 50).

Applicant  
for admin-  
istration to  
depote to  
value of  
the realty  
in certain  
cases.

58. In every case where any person applies to be appointed an administrator with the will annexed of a person who died before the 1st day of July, 1886, and a bond is by law required to be given, he shall in his application state and in his affidavit of the value of the property devolving shall depote to the value or probable value of all the real estate over which, or over any estate in which, the executor or executors named in the will or codicil were by the said will or codicil clothed with any power of disposition, or of all the real estate, which, in case of no executor being appointed, was by the will or codicil directed to be disposed of, without any person being appointed to effect such disposition; and in every such case the bond to be given by such person upon his obtaining a grant of administration with the said will annexed, shall, as respects the amount of the penalty of the bond, and the justification of the sureties, include the amount of the value or probable value so stated and depoted to; and the condition of the bond, in addition to the other provisions thereof, shall provide that the administrator shall well and truly pay over, and account for, to the person or persons entitled to the same, all moneys and assets to be received by him for or in consequence of the exercise by him of any power over real estate created by the will or codicil, and which may be exercised by him. R. S. O. 1897, c. 59, s. 58 (s. 55, R. S. O. 1887, c. 50; Ont. Acts, 1890, c. 17, s. 14).

Adminis-  
tration *de  
bonis non*.

**90.** Where a surviving executor or sole executor dies after probate intestate, no interest is transmissible to his own administrator; but administration of another

sort becomes necessary, which is called administration de bonis non, that is, of the goods of the original testator left unadministered by the former executor.

*Tingrey v. Brown*, 1 Bos. & Pull. 310.

**91.** The administrator de bonis non will, when appointed, be the only representative of the party originally deceased. Effect of such appointment

**92.** If a party who, as next of kin to the testator at the time of his death, was entitled to administration, dies before letters of administration are obtained, his representative is entitled to the grant in preference to one who has no beneficial interest in the effects, although he may have become next of kin at the time the grant was required. Representative of next of kin.

*Savage v. Blythe*, 2 Hagg. Appendix, 150.

**93.** Where such administration has been granted to two, and one dies, the survivor will be sole administrator. Upon the death of such surviving administrator, or of a sole administrator, in order to effect a representation of the first intestate, the Court, whether the administrator died testate or intestate, must appoint an administrator de bonis non. Administration granted to two, one dies.

**94.** With regard to the power and authority of an administrator de bonis non, he becomes only a personal representative of the original deceased, and with respect to the estate left unadministered by the former executor or administrator, he has the same power and authority as the original representative, for he succeeds to all the legal rights which belonged to the former executor or administrator in his representative character. Power of administrator de bonis non.

2 Black. Comm. 506.

**95.** An administrator de bonis non is entitled to all the goods and personal estate, such as terms for years, household goods, etc., which remain in specie and were not administered by the first executor or administrator. Rights of administrator de bonis non.  
If an executor receives money in right of his testator,

and lays it up by itself and dies intestate, this money shall go to the administrator de bonis non, being as easily distinguished to be part of the testator's effects as goods in specie. And wherever assets are in the hands of a third person at the death of an administrator or executor, intestate, the administrator de bonis non may sue for their recovery.

*Langford v. Mahony.*

#### 4. Limited Administrations.

Limited  
adminis-  
tration.

**96.** Besides the administrations already discussed, which extend to the whole property of the deceased and terminate only with the life of the grantee, it is competent to the Court to grant limited administrations, which are confined to a particular extent of time or to a specified subject matter.

Wms. 415.

*Durante  
minore  
aetate.*

**97.** If a person appointed sole executor, or he to whom in case of intestacy the right to administration has devolved under the statute, be under age, a peculiar sort of administration must be granted, which is called an administration *durante minore aetate*. In the former case it is obviously a species of administration *cum testamento annexo*.

Wms. 416.

Several  
executors,  
one an  
infant.

**98.** If there are several executors and one of them is of full age, no administration of this kind ought to be granted, because he who is of full age may execute the will.\* This sort of administration has been frequently held not to be within the statute of 21 Henry VIII. cap. 5, and consequently it is discretionary in the Court to grant it to such persons as it shall think fit.

Infant not liable on a devastavit: *Young v. Purves*, 11 O. R. 587.

Discretion  
of Court.

**99.** In the exercise of this discretion it was the practice of the Spiritual Court to grant the administration to

\* Paragraph 2, above. *West v. Wilby*, 3 Phillim. 379.

the guardian, whom that Court had a right by law to appoint for a personal estate.

*See John v. Bradbury, L. R. 1 P. & D. 245.*

**100.** By Statute 38 Geo. III. cap. 87, s. 6, it is enacted that where an infant is sole executor administration with the will annexed shall be granted to the guardian of such infant, or to such other person as the Spiritual Court may think fit, until such infant shall have obtained the full age of twenty-one years, at which period, and not before, probate of the will shall be granted to him.

*See section 2, ante.*

**101.** The limit of the administration of an administrator *durante minore ætate* is the minority of the person only. A power of sale given to executors or administrators may be executed by an administrator *durante minore ætate*.

*Monsell v. Armstrong, L. R. 14 Eq. 423. See Re Cope, 16 C. D. 49.*

*Re Thompson v. McWilliams, 1 I. R. 356.*

**102.** An administrator *durante minore ætate* who has wasted the goods of the deceased, cannot be charged by a creditor as executor *de son tort* after the infant has obtained his majority, because the administrator at the time had lawful power to administer.

*Brooking v. Jennings, 1 Mod. 174.*

**103.** In case of a controversy in the Spiritual Court concerning the right of administration to an intestate, it seems to have been always admitted that it was competent to the Ordinary to appoint an administrator *pendente lite*. The following is the provision of the Ontario Act on this point. (Taken from section 70, Imp. Act, 20 & 21 Viet. cap. 77):

56. Pending an action touching the validity of the will of any deceased person, or for obtaining, recalling or revoking any probate or grant of administration, the Court in which an action is

Adminis-  
tration  
pendente  
lite may be  
granted.

Rights and  
powers of  
the admin-  
istrator.

pending may appoint an administrator of the property of the deceased person, and the administrator so appointed shall have all the rights and powers of a general administrator, other than the right of distributing the residue of the property, and every such administrator shall be subject to the immediate control of the Court and act under its direction; and the Court may direct that such administrator shall receive out of the property of the deceased such reasonable remuneration as the Court shall think fit.\* R. S. O. 1897, c. 59, s. 56 (s. 53, R. S. O. 1887, c. 50; Ont. Acts, 1890, c. 17, s. 13).

See *Wilson v. Beatty*, 9 A. R. 149; *Peterkin v. McFarlane*, 6 A. R. 251; *Beatty v. Haldan*, 4 A. R. 239; *Costs-McArdle v. Moore*, 2 O. R. 229; *Re Williams and McKinnon*, 14 P. R. 338.

Indifferent  
party pre-  
ferred.

**104.** It is the practice to decline to put a litigant party in possession of the property by granting administration pendente lite to him. A nominee presumed to be indifferent is preferred.

Cases cited, Wms. 430.

Appointee  
of Court.

**105.** Administrators pendente lite are the appointees of the Court, and not merely nominees or agents of the several parties on whose recommendation they are selected.

*Stanley v. Bernes*, 1 Hagg. 221.

Adminis-  
tration  
durante  
absentia

**106.** If an executor named in the will or the next of kin be out of the Province, the Ecclesiastical Courts had and the Surrogate Court has power, before letters probate obtained or letters of administration issued, to grant to another limited administration durante absentia. Such an administrator is such a legal representative as to entitle him to assign the property of the deceased.

*Webb v. Kirby*, 3 Sm. & G. 333.

\* By the Rules of Practice of the Supreme Court of Judicature for Ontario (Rule 195),

"Where probate of the will of a deceased person or letters of administration to his estate have not been granted, and representation of such estate is required in any action by proceedings in the High Court, the Court may appoint some person administrator ad litem." See Con. Rule 311. Rules of 1 Jan. 1896, 1444.

**107.** But when probate was once granted and the executor had gone abroad, the Ecclesiastical Courts did not feel themselves authorized to grant new administration on the ground that the executor had left the kingdom; nor could a Court of Equity interfere by appointing a receiver. The consequence was that there was no person existing within the jurisdiction of the Courts of Law or Equity duly authorized to appear and collect the debts. The Statute 38 Geo. III. cap. 87, remedied this defect by enacting that if at the expiration of twelve months from the testator's decease the executor to whom probate was granted did not reside within the jurisdiction of the Courts, any creditor, next of kin or legatee could obtain special administration. Absence of executor.  
38 Geo. III. c. 87.

**108.** There are several other instances of temporary administrations, granted as well cum testamento annexo, as in cases of complete intestacy.

Wms. p. 439.

**109.** An executor may be appointed with limitations as to the time when he shall begin his office, as where a man is appointed to be executor at the expiration of five years from the death of the testator. So the testator may appoint the executor of A. to be his executor; and then if he die before A. he has no executor till A. die. In these cases the Court must commit administration limited until there be an executor. Limitations as to time.

**110.** So it may be necessary to decree a limited administration till the will of the deceased can be produced in order to be admitted to probate. For instance, a will may be in some foreign country under circumstances on account of which it may not be obtainable for some time. Until a production of will.

*In the Goods of Metcalfe*, 1 Add. 343.

**111.** Where a will proved to have been in existence after the testator's death, is accidentally lost, and the contents unknown, the Court will grant administration limited until the original will be found and brought into the registry. Till lost will be found.

*In the Goods of Campbell*, 2 Hagg. 555.



Executor  
becoming  
a lunatic.

**112.** If an executor be disabled from acting, as if he become a lunatic or incapable of legal acts, then on the principle of necessity there shall be a grant of temporary administration with the will annexed. Where a sole executor or administrator becomes a lunatic, it is the ordinary practice of the Court to make a grant to his committee for his use and benefit during his lunacy.\*

*In the Goods of Penny*, 4 Notes of Cas. 659.

Limitation  
to certain  
specific  
effects.

**113.** There may also be a grant of administration limited to certain specific effects of the deceased; and the general administration may be committed to a different person, but such a grant is entirely exceptional, and should not be made unless very strong reason be given.

*In the Goods of Prothero*, L. R. 3 P. & D. 209.

Revival of  
adminis-  
tration for  
a single  
act.

**114.** It frequently happens that the personal administration of a party deceased is broken, and its revival is necessary merely for the performance of a single act. In such case administration de bonis non will be granted limited to that particular object.

*In the Goods of Fenton*, 3 Add. 36 n. (a).

Adminis-  
tration *ad  
litem*.

**115.** So where a claim on property in dispute would vest in the personal representative of a deceased person, and there is no general personal representative of that person, an administration limited to the subject of the suit may be necessary to enable the Court to proceed to

Revoca-  
tion of  
temporary  
grants of  
adminis-  
tration not  
to preju-  
dice  
actions.

\* As to revocation of temporary grants the following provision is made:

62. In case, before the revocation of any temporary administration, proceedings have been commenced by or against the administrator so appointed, the Court in which the proceedings are pending may order that a suggestion be made upon the record of the revocation of such administration, and of the grant of probate or administration which has been made consequent thereupon, and the proceedings shall be continued in the name of the new executor or administrator in like manner as if the proceedings had been originally commenced by or against such new executor or administrator, but subject to such conditions and variations, if any, as the Court may direct. R. S. O. 1897, c. 59, s. 62 (s. 59, R. S. O. 1887, c. 50).

a decision on the claim. And when a right is clearly vested as a trust term which is required to be assigned, an administration of the effects of the deceased trustee limited to the trust term is necessary to warrant the decree of the Court for assignment of the term.

Mitf. Plg. (4th) 177.

**116.** In cases of such limited administrations the parties entitled to the general grant may take out a *caeterorum* administration representation.

*In the Goods of Currey*, 5 Notes of Cases, 54.

**117.** Further, such limited administrations in strictness ought not to be granted without either the regular renunciation of the party entitled according to the practice of the Court to the general grant; or a citation of such party to accept or refuse. But under peculiar circumstances, this seems to have been sometimes dispensed with.

*Harris v. Milburn*, 2 Hagg. 63.

**118.** Finally an administration limited to the effects of the deceased in one country or place may be committed to one administrator, and an administration limited to those in another country or place to another.

*In the Goods of Mann* (1891) P. 293.

**119.** An executor may perform most of the acts appertaining to his office before probate. But with respect to an administrator, the general rule is that a party entitled to administration can do nothing as administrator before letters of administration are granted to him, inasmuch as he derives his authority not like an executor from the will, but entirely from the appointment of the Court.

*Wankford v. Wankford*, 1 Salk. 301.

**120.** Letters of administration have been held to have a relation to the death of the intestate so as to give

*caeterorum*  
admin-  
istration.

Citation or  
consent  
required  
before  
grant.

Local ad-  
ministra-  
tion.

An admin-  
istrator  
can do  
nothing as  
such before  
grant.

Adminis-  
tration by  
relation.

a validity to acts done before the letters were obtained. Thus if a man takes the goods of the deceased as executor de son tort and sells them, and afterwards obtains letters of administration, it seems the sale is good.

*Hill v. Curtis*, L. R. 1 Eq. 99, 100.

*Trice v. Robinson*, 16 O. R. 433.

Acts must  
be for the  
benefit of  
the estate. **121.** The administration by relation exists only in those cases where the act is done for the benefit of the estate.

*Morgan v. Thomas*, 8 Exch. 302.

## CHAPTER III.

## RENUNCIATION AND RETRACTATION.

**122.** The office of executor being a private one of trust named by the testator and not by the law, the person nominated may refuse though he cannot assign the office, and even if in the lifetime of the testator he has agreed to accept the office, it is still in his power to recede.

Refusal by executor.

*Doyle v. Blake*, 2 Sch. & Lef. 239.

*Vanatto v. Mitchell*, 13 Chy. 665; *Travers v. Gustin*, 20 Chy.

106. Renunciation a forfeiture of bequest. *Paton v. Hickson*, 25 Chy. 545.

**123.** But though the executor cannot be compelled to accept the executorship, yet by Statute 21 Hen. VIII. cap. 5, s. 8, the Ordinary might convene before him any person made and named executor of any testament "to the intent to prove or refuse the testament," and if he neglected to appear he was punishable by excommunication.

May be compelled to appear with will.

Wms. p. 225.

**124.** The time allowed to the person named executor to deliberate whether he will accept or refuse the executorship is uncertain, and left to the discretion of the Judge, who has been used at his pleasure not only within the year, but within a month or two to issue his citation.

Time allowed for deliberation.

**125.** If he appear either on citation or voluntarily and ask for time to consider whether he will act or not the Ordinary might grant a temporary administration in the meantime, but if he appears and refuses to act or fails to appear, administration cum testamento annexo will be granted to another.

Temporary administration may be granted.

When  
right  
ceases after  
citation.

**126.** By Statute 21 & 22 Vict. cap. 95, s. 16,\* when ever an executor appointed in a will survive a testator, but dies without having taken probate, and whenever named in a will, is cited to take probate, and does not appear to such citation, the right of such person in respect to the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall go without any further renunciation, as if such person had not been appointed executor.

How elec-  
tion deter-  
mined.

**127.** Although an executor has his election whether he will accept or refuse the executorship, yet he may determine his election by acts which amount to an administration. For if he once administer it is considered that he has already accepted the executorship, and the Court may compel him to prove the will, or may accept a refusal notwithstanding he has administered, but only on terms of his passing his accounts, and perhaps of paying the costs out of his own pocket.

*Mordaunt v. Clarke*, L. R. 1 P. & D. 592.

*McDonald v. McDonald*, 17 A. R. 192, affirmed, 21 S. C. R. 201.

One of  
several re-  
nouncing.

**128.** If one of several executors, after intermeddling with the effects renounces, his renunciation is invalid.

*In the Goods of Badenach*, 3 Sw. & Tr. 465.

What acts  
constitute  
acceptance

**129.** As to what acts will amount to an administering, such as to render an executor compellable to take probate, two general rules may be laid down: first, That whatever the executor does with relation to the goods and effects of the testator which shows an intention in him to take upon him the executorship, will regularly amount to an administration; second, That whatever acts will make a man liable as executor de son tort will

\* This statute was passed before 5th December, 1859, and is therefore incorporated into our practice. R. S. O. 1897, c. 59, s. 37 (R. S. O. 1887, c. 50, s. 34). *Re Monteith*, 10 P. R. 334. This section is wider than section 65 of our Act. See that section at end of this chapter.

be deemed an election of the executorship. What constitutes "intermeddling" will be discussed later on.

Wms. p. 228. See section 167 post.

**130.** With respect to the mode of refusal by the executor, it is laid down that refusal cannot be verbally or by word, but it must be by some act entered or recorded in the Surrogate Court. But if an executor send a letter to the Ordinary, by which he renounces, and the refusal be recorded, it is sufficient. Accordingly, it has been held that a renunciation need not be under seal.

Mode of refusal.

*Long v. Symes*, 3 Hagg. 776.

**131.** Until the refusal is recorded no person can take administration.

Refusal must be recorded.

*Garrard v. Garrard*, L. R. 2 P. & D. 238.

**132.** An executor cannot in part refuse. He must refuse entirely or not at all.

Refusal must be entire.

*Brooke v. Haymes*, L. R. 6 Eq. 25.

**133.** An executor who renounced might formerly at any time before the granting of administration cum testamento annexo retract his renunciation, but the Ontario Act, section 52 (taken from Imp. Act 20 & 21 Vict. cap. 77, s. 79) provides as follows:

Retraction of renunciation

65. Where a person renounces probate of the will of which he is appointed executor (or one of the executors) his rights in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, to without any further renunciation go, devolve and be committed in like manner as if he had not been appointed executor. R. S. O. 1897, c. 59, s. 65 (s. 62, R. S. O. 1887, c. 50).

Right of executor renouncing probate, to cease absolutely.

**134.** If a debtor makes his creditor and another his executors, and the creditor neither intermeddles nor proves the will, he may bring an action against the other.

Debtor and creditor.

*Raclinson v. Shaw*, 3 Term Rep. 557.

## CHAPTER IV.

## ADMINISTRATION BOND.

Former  
statutory  
provisions.

**135.** The Statute 21 Hen. VIII. cap. 5, s. 3, directs the Ordinary to grant administration, taking surety of him or them to whom shall be made such commission. And the Statute 22 & 23 Car. II. cap. 10, s. 1, further provides that the Ordinary shall take sufficient bonds, with two or more able sureties in the form given by the statute providing for (1) the making of an inventory; (2) to administer well and truly; (3) to make a true and just account of his administration; (4) to deliver and pay the residue as the Judge shall appoint, and (5) to deliver up the letters if the will shall appear.

Present  
law.

**136.** The Ontario Statute on this point now provides as follows:

Repeal of  
certain  
provisions  
requiring  
sureties to  
adminis-  
trator.  
21 Hen.  
VIII. c.  
5; 22-3  
Car. II. c.  
10; 1 Jas.  
c. 17.

68. So much of the Act passed in the 21st year of King Henry the Eighth, and chaptered 5, and of the Act passed in the 22nd and 23rd years of King Charles the Second, and chaptered 10, and of the Act passed in the 1st year of King James the Second, and chaptered 17, as requires any surety, bond or other security to be taken from a person to whom administration may be committed, shall not extend to or be in force in Ontario. R. S. O. 1897, c. 59, s. 68 (s. 63, R. S. O. 1887, c. 50).

69. Except where otherwise provided by law, every person to whom a grant of administration is committed shall give a bond to the Judge of the Surrogate Court from which the grant is made; to enure for the benefit of the Judge of the Court for the time being (or in case of the separation of counties, to enure for the benefit of any Judge of a Surrogate Court to be named by the High Court for that purpose), with one or more surety or sureties as may be required by the Judge of such Surrogate Court, conditioned for the due collecting, getting in and administering the real and personal estate of the deceased, and the bond shall be in the form prescribed by the rules and orders now in force or hereafter made under this Act; and in cases not provided for by such rules and

orders, the bond shall be in such form as the Judge of the Surrogate Court may by special order direct. R. S. O. 1897, c. 59, s. 69 (s. 64, R. S. O. 1887, c. 50).

70. Subject to the provisions of section 58 of this Act, the bond shall be in a penalty of double the amount under which the real and personal estate and effects of the deceased have been sworn, unless the Judge thinks fit to direct (as he may do) that the same shall be reduced, and the Judge may also direct that more bonds than one may be given, so as to limit the liability of any surety to such amount as the Judge thinks reasonable. R. S. O. 1897, c. 59, s. 70 (s. 65, R. S. O. 1887, c. 50).

Persons receiving grants of administration to give bonds, etc.

71. The Judge, on application made on motion or petition in a summary way, and on being satisfied that the condition of the bond has been broken, may order the registrar of the Court to assign the same to some person to be named in the order, and such person, his executors or administrators, shall thereupon be entitled to sue on the said bond in his own name, as if the same had been originally given to him, instead of to the Judge of the Court, and shall be entitled to recover thereon, as trustee, for all persons interested, the full amount recoverable in respect of any breach of the condition of the bond; and all bonds heretofore given or taken in any Surrogate Court, and now in force, may in like manner be assigned under the authority of a Judge of the Surrogate Court, and the assignee shall be entitled to sue and recover thereon in his own name, and the same may be enforced in the same way and to the same extent as bonds given under this Act. R. S. O. 1897, c. 59, s. 71 (s. 66 R. S. O. 1887, c. 50).

Penalty in bonds, etc., and as to dividing liabilities of sureties.

73. (1) Notwithstanding anything to the contrary contained in any bond or other security heretofore or hereafter made and entered into with respect to the administration of an estate, or in any letters probate or letters of administration, no executor or administrator shall be compellable to render an account of his executorship or administration to the Surrogate Court within eighteen months, except in cases in which a party interested in an estate takes proceedings to obtain an inventory and accounting, or in which infants are interested in such inventory and accounting.

Power of Surrogate Courts as to assignment of bonds.

73. (2) The oaths to be taken by executors and administrators, and the bonds or other security to be given by administrators, and letters probate and letters of administration hereafter issued, shall require the executor and administrator to render a just and full account of his executorship or administration only when thereunto lawfully required. R. S. O. 1897, c. 59, s. 73 (Ont. Acts, 1894, c. 22, s. 1; 1895, c. 13, s. 30).



## CHAPTER V.

REVOCATION OF PROBATE OR LETTERS OF  
ADMINISTRATION.

**137.** A probate or grant of administration may be revoked in two ways: 1. On a suit by citation. 2. On an appeal to a higher tribunal to reverse the sentence by which they are granted.

Wms. p. 487.

**138.** A revocation by citation usually is when the executor or administrator is cited before the Judge by whom the probate or letters of administration were originally granted, to bring in the same, and to show cause why they should not be revoked.

**139.** Where an executor obtains probate of a will in common form he may afterwards be cited by next of kin to prove it per testes or in solemn form. And upon this citation, if the executor does not sufficiently prove the will, the probate will be revoked.

*Blake v. Knight*, 3 Curt. 553.

**140.** If the will has been proved in solemn form either by the executor himself, in the first instance, or upon citation, as above stated, and the next of kin have been cited to see proceedings, they cannot afterwards by a fresh citation again put the executor on proof of the will, but if fraud be shown, or a later distinct will be set up, then the party having an interest under such later will may again cite the executor who has succeeded in proving in solemn form, and obtain a revocation of the probate.

*Rutcliffe v. Barnes*, 2 S. & Tr. 486.

**141.** An administration may be revoked where it was granted in an irregular manner, as where the next of kin comes too hastily to take out the administration within the fourteen days, or where it has been granted without giving the necessary parties, in which case the administration though not void is voidable.

Revoca-  
tion of ad-  
ministra-  
tion.

**142.** Again, an administration may be revoked if a next of kin to whom it has been committed becomes non compos or otherwise incapable, or it has been said if he goes beyond seas.

Next of  
kin non  
compos,  
etc.

**143.** The Court may repeal its grant of administration when made to other than the next of kin, or to one of kin but not next of kin, or to a creditor before the renunciation of the next of kin. In this case the administration is not void but voidable only.

Grant of  
adminis-  
tration  
voidable.

Old authorities, Wms. p. 494.

**144.** An administration repealed quia improvide shall be re-granted to the same person (ad eundem).

Re-grant  
ad eundem.

**145.** The jurisdiction to remove an executor was formerly doubtful even in the High Court, but by Ontario statute it is now provided as follows:

Power to  
remove ex-  
ecutors or  
adminis-  
trators in  
certain  
cases.

66. (1) The Surrogate Court by which the grant of probate or letters of administration was made shall, where the entire estate left by the testator or intestate does not exceed \$1,000, have the like authority for the removal of an executor or administrator as is by section 39 of the Judicature Act\* conferred upon the High

\* The section of the Judicature Act above referred to is as follows:

39. (1) The High Court may remove an executor or administrator upon the same grounds as such Court may remove any other trustee, and may appoint some other proper person, or persons, to act in the place of the executor or administrator so removed.

(2) The order may be made upon the application of any executor or administrator desiring to be relieved from the duties of office, or of any executor or administrator complaining of the conduct of a co-executor or co-administrator, or of any person interested in the estate of the deceased.

3 Subject to any rules to be made under this Act the practice in force for the removal of any other trustee shall be applicable to proceedings to be taken in the High Court under this section. R. S. O. 1897, c. 59, s. 39 (Ont. Stat. 1896, c. 18, s. 14)

Subsection 4 is the same as subsection 2 above. Subsection 5 is already quoted, paragraph 31, ante. Subsection 6 is the same as section 67 above.

Court, but nothing in this section contained shall affect the jurisdiction of a Surrogate Court to revoke a grant of probate of letters of administration in any case where, prior to the 7th day of April, 1896, it possessed such authority.

(2) Where the executor or administrator removed is not a sole executor or administrator the Court need not, unless it sees fit, appoint any person to act in the room of the person removed, and if no such appointment is made the rights and estate of the executor or administrator removed shall pass to the remaining executor or administrator as if the person so removed had died. (Ont. Acts, 1896, c. 20, s. 1.)

Practice.

Rev. Stat.  
c. 50.

Order for  
removal.

3. Subject to rules made under this Act, the practice in the Surrogate Courts under this section shall be the same as nearly as may be as the practice in force in respect of proceedings for the revocation of grants of probate. (Ont. Acts, 1896, c. 20, s. 2.)

67. A certified copy of the order of removal shall be filed with the Surrogate clerk, and another copy with the registrar of the Surrogate Court, by which probate or administration was granted, and such officers shall at or upon the entry of the grant in the registers in their respective offices make, in red ink, a short note giving the date and effect of the order, and shall also make a reference thereto in the index of the register at the place where such grant is indexed. (Ont. Acts, 1896, c. 20, s. 4.)

Caveat.

**146.** It is usual where there is a question about a will, or when the right of administration comes in dispute, to enter what is called a caveat, which is a caution entered in the Court of Probate to stop probates, administrations, faculties and such like from being granted without the knowledge of the person that enters. A caveat is a mere cautionary act done by a stranger to prevent the Court from doing any wrong, and, therefore, administration or probate granted contrary to a caveat entered shall not stand good.

Practice  
respecting  
caveats.

**147.** The provision of the Surrogate Courts Act as to the practice on caveats is as follows:

52. Caveats against the grant of probate or administration may be lodged with the Surrogate clerk, or with the registrar of any Surrogate Court, and, subject to any rules or orders under this Act, the practice and procedure under such caveats shall as nearly as may be correspond with the practice and procedure under caveats in use on the 5th day of December, 1859, in Her Majesty's Court of Probate in England. R. S. O. 1897, c. 59, s. 52 (s. 49, R. S. O. 1887, c. 50).

**148.** If an administration has been properly granted it cannot be revoked, even on the application of the administrator himself, and although he has not intermeddled with the effects; at all events unless some strong ground for the revocation be shown.

No revocation of a proper grant.

*In the Goods of Reid*, 11 P. D. 70.

**149.** It remains to consider what effect the revocation of probate or letters of administration has on the intermediate acts of the former executor or administrator.

Effect of revocation.

**150.** The first important distinction on this subject is between grants which are void and such as are merely voidable. If the grant be of the former description, the mesne acts of the executor or administrator done between the grant and its revocation shall be of no validity. As, if administration be granted on the concealment of a will and afterwards the will appear, inasmuch as the grant was void from its commencement, all acts performed by the administrator in that capacity shall be equally void, nor can they, although the executor should refuse to act, be made good by relation.

Distinction between void and voidable grants.

Distinguish *Boxall v. Boxall*, 27 C. D. 220; in which case in the suppressed will no executors were appointed.

**151.** As between the rightful representative and the person to whom the executor or administrator under a void probate or grant of letters has aliened the effects of the deceased, the act of alienation, if done in the due course of administration, shall not be void.

Act of alienation.

**152.** The following sections of the Surrogate Courts Act seem to provide fully for the validity of payments under revoked grants:

*Bona fide* payments made and upheld.

63. In case any probate or administration is revoked under this Act, all payments bona fide made to any executor or administrator under such probate or administration before the revocation thereof, shall be a legal discharge to the person making the same; and the

Payments under probate or administration shall be upheld.

afterwards executor or administrator who has acted under such revoked probate or administration, may retain and reimburse himself in respect of payments made by him, which the person to whom probate or administration may be afterwards granted might have lawfully made. R. S. O. 1897, c. 59, s. 63 (s. 60, R. S. O. 1887, c. 50).

Persons, etc., making payment upon probate granted, to be indemnified, etc. 64. All persons and corporations making or permitting to be made any payment or transfer bona fide upon any probate or letters of administration granted in respect of the estate of any deceased person under the authority of this Act, shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of the probate or letters of administration R. S. O. 1897, c. 59, s. 64 (s. 61 R. S. O. 1887, c. 50).

The above sections are taken from sections 77 and 78 of Imp. Act 20 & 21 Vict. cap. 77.

## CHAPTER VI.

### ANCILLARY PROBATE AND ADMINISTRATION.

**153.** If a foreign executor should find it necessary to institute a suit in Ontario to recover a debt due to his testator, he must prove the will here also, or a personal representative must be cited. Foreign executor must prove in Ontario.

*Attorney-General v. Bourens*, 4 M. & W. 193.

**154.** In order to sue in any Court in Ontario in respect of the property of a deceased person, the plaintiff must appear to have obtained probate or letters of administration in a Surrogate Court of this province. On the ground of letters testamentary or administration granted to the plaintiff in the country where the deceased died ancillary\* probate or administration will be granted. Ancillary probate or administration.

*Vanquelin v. Boward*, 15 C. B. N. S. 341; *Enohin v. Wylie*, 10 H. L. 19.

See *Pritchard v. Standard Life*, 7 O. R. 188; *Re O'Brien*, 3 O. R. 326.

**155.** Likewise if a will be made in a foreign country and proved there, disposing of property in Ontario, the executor must prove the will here also. Generally speaking, the Surrogate Court in this country will adopt the decision of the Court of Probate in the foreign country in which the testator died domiciled. Foreign will.

*In the Goods of Deshaies*, 34 L. J. P. & M. 58.

**156.** All personal property follows the person, and the rights of a person constituted in Ontario representative of a party deceased, domiciled in Ontario, are not limited to the personal property in Ontario, but extend to such property wherever locally situated. Rights of Ontario administrator or executor extend abroad.

*Spratt v. Harris*, 4 Hagg. 405.

\* Ancilla, a "handmaid."

Devolu-  
tion of Es-  
tates Act  
a local law.

**157.** The declaration in the Ontario Devolution of Estates Act that land shall descend as personalty is a local law, which will not give persons obtaining probate or administration in Ontario similar rights in countries where real and personal property are governed by different rules.

Foreign  
Courts  
would prob-  
ably fol-  
low deci-  
sion of lo-  
cal Courts.

**158.** If it should become necessary that the Courts of the foreign country where the assets were situate should grant probate or administration for the purpose of giving a legal right to recover and deal with them, such Courts, by the comity of nations, would probably follow the decision of the Surrogate Court in this province as being the country of domicile.

*Enohia v. Wylie*, 10 H. L. Cas. 1.

Local  
probate  
extends to  
foreign  
personal  
estate.

**159.** Though the executor of a man who has died domiciled in Ontario be not able to sue in a foreign Court by virtue of the Ontario probate any more than he can sue in an Ontario Court by virtue of a foreign probate, yet for the purpose of suing in an Ontario Court, a probate obtained in the proper Court here extends to all the personal property of the deceased wherever it is situate at the time of his death, whether in Ontario or in Great Britain, or in any country abroad.

*White v. Rose*, 3 Q. B. 493, 507.

Law of  
domicile  
governs  
succession  
of person-  
alty, and  
also what  
is the last  
will.

**160.** The law of the country in which the deceased was domiciled at the time of the death, not only decides the course of distribution or succession as to the personalty, but regulates the decision as to what constitutes the last will without regard either to the place of birth or death, or the situation of the property at the time.

*Miller v. James*, L. R. 3 P. & D. 4.

Law of  
particular  
domicile  
may  
govern.

**161.** When it is said that the law of the country of domicile must regulate the succession, it is not always meant to speak of the general law, but in some instances of the particular law which the country of domicile applies to the case of foreigners dying domiciled there, and

ANCILLARY PROBATE AND ADMINISTRATION.

which would not be applied to a natural-born subject of that country.

See *Collier v. Rivaz*, 2 Curt. 855; *Maltass v. Maltass*, 3 Curt. 231.

**162.** It has been the practice upon producing an exemplified copy of the probate granted by the proper Court in a country where the deceased died domiciled for the Court here to follow the grant upon the application of the executor in decreeing its own probate.

Foreign grant will be followed here.

*In the Goods of Earl*, L. R. 1 P. & D. 450.

**163.** When the Court is satisfied that the testator died domiciled in a foreign country, and that his will contained a general appointment of executors, and has been duly authenticated by those executors in the proper Court in the foreign country, it is the duty of the Surrogate Court in this province to clothe the foreign executors with ancillary letters of probate to enable them to get possession of that part of the personal estate which was locally situate in Ontario.

Administration to be effected by local Court.

*Enoch v. Wylie*, 10 H. L. 14.

Rights of foreign creditors. *Milne v. Moore*, 24 O. R. 456.

**164.** By Imperial Statute known as the Colonial Probates Act, 1892 (55 & 56 Vict. c. 6), provision is made for the recognition of colonial probates in the United Kingdom. This Act is printed as an appendix. The following sections of the Ontario Statute contain the recognition desired by the Imperial authorities:

Wills made by British subjects dying after 6th August, 1861.

78. Where any probate or letters of administration, or other legal document purporting to be of the same nature, granted by a Court of competent jurisdiction in the United Kingdom, or in any Province or territory of the Dominion, or in any other British Province, is produced to, and a copy thereof deposited with, the registrar of any Surrogate Court of this Province, and the prescribed fees are paid as on a grant of probate or administration, the probate, or letters of administration or other document aforesaid, shall, under the direction of the Judge, be sealed with the seal of the said Surrogate Court, and shall thereupon be of the like force and effect in Ontario, as respects personal estate only, as if the same had been originally granted by the said Surrogate Court of this



Province, and shall (so far as regards this Province) be subject to any orders of the last mentioned Court, or on appeal therefrom, as if the probate or letters of administration had been granted thereby. R. S. O. 1897, c. 59, s. 78 (Ont. Acts, 1888, c. 9, s. 1 (1)).

79. The letters of administration shall not be sealed with the seal of the said Surrogate Court until a certificate has been filed under the hand of the registrar of the Court which issued the letters, that security has been given in such Court in a sum of sufficient amount to cover as well the assets within the jurisdiction of such Court as the assets within Ontario, or in the absence of such certificate, until like security is given to the Judge of the Surrogate Court covering the assets in Ontario as in the case of granting original letters of administration. R. S. O. 1897, c. 59, s. 79 (Ont. Acts, 1888, c. 9, s. 1 (2)).

*(Proclamation bringing 51 Viet. c. 9 (now above sections 78, 79) into full force, published in Gazette, 27th May, 1893. For order of Her Majesty in Council applying "The Colonial Probates Act, 1892," to the Province of Ontario, and for Rules under that Act, see Statutes of Ontario, 1895, page x.)*

Distribu-  
tion by  
Ontario  
Court.

**165.** Where the deceased has left a will valid by the law of his domicile, and probate either original or ancillary has been obtained here, the duty of the Court in administering the property is to ascertain who by the law of domicile are entitled under the will, and that being ascertained, to distribute the property accordingly. The duty of administration has to be discharged by the Courts of this province, though in the performance of that duty they will be guided by the law of the domicile.

Imp. Act,  
23 & 24 V.  
c. 114.

**166.** Under Imperial Statute 23 & 24 Viet. cap. 114, every will made by a British subject out of the United Kingdom is to be admitted to probate, if made according to the law of the place where it was made, or where the testator was domiciled or had his domicile of origin. 2. A will made by a British subject within the United Kingdom is to be admitted if made according to the local law; and, 3. No will is to be revoked or the construction altered by reason of any subsequent change of domicile.

## CHAPTER VII.

## INTERMEDDLING WITHOUT AUTHORITY.

**167.** If one who is neither an executor nor administrator intermeddles with the goods of the deceased, or does any other act characteristic of the office of executor, he thereby makes himself what is called in the law an executor of his own wrong, or more usually an executor de son tort. Result of intermeddling.

See *Hursell v. Bird*, 65 L. T. 709.

**168.** A very slight circumstance of intermeddling with the goods of the deceased will make a person executor de son tort. Thus, it is said that milking the cows, even by the widow of the deceased, or taking a dog, will constitute an executorship de son tort. So, in one case, the taking a Bible, and in another a bedstead were held sufficient, inasmuch as they were the indicia of the person so interfering being the representative of the deceased. So, if a man kills the cattle or uses or gives away or sells any of the goods, or if he takes any of the goods to satisfy his own debt or legacy, or if the wife of the deceased takes more apparel than she is entitled to, she will become an executor de son tort. So there may be a tort executor of a term for years, as where a man enters upon the land leased to the deceased, and takes possession claiming a particular estate. Though with respect to a term of years in reversion there can be no executorship of this nature, because it is incapable of entry. What acts will constitute intermeddling.

See *Serle v. Waterworth*, 4 M. & W. 9.

**169.** Again, if a man demands the debts of a deceased, or makes acquittances for them, or receives them, he will become executor de son tort. So, if a man pays Collecting debts.

the debts of the deceased or the fees about proving his will, this will constitute him executor *de son tort*, but it is otherwise if he pays the debts or fees with his own money.

Bringing  
suit.

**170.** Likewise, if a man sue as executor, or if an action be brought against him as executor, and he pleads in that character, this will make him an executor *de son tort*.

Fraudu-  
lent inter-  
meddling.

**171.** By 43 Eliz. cap. 8, it is enacted "That every person who shall obtain, receive and have any goods or debts of any person dying intestate, or a release or other discharge of any debt or duty belonging to the intestate upon any fraud, as described in that Act, or without such valuable consideration as shall amount to the value of these goods, unless in satisfaction of some debt, such person shall be chargeable as executor of his own wrong."

If will  
proved a  
stranger  
cannot be  
executor  
*de son tort*.

**172.** When a will is proved or administration granted, and another person then intermeddles with the goods, this does not make him an executor *de son tort* by construction of law, because there is another personal representative of right against whom the creditors can bring their actions, and such wrongful intermeddler is liable to be sued as trespasser.

An action will not lie against one as executor *de son tort*, where there is a legally appointed administrator, even though the latter may have conveyed the estate to the former on condition of his paying the debts of the deceased.

*Armstrong v. Armstrong*, 44 U. C. R. 615.

Acts which  
are not  
intermed-  
dling.

**173.** There are many acts which a stranger may perform without incurring the hazard of being involved in such an executorship; such as locking up the goods for preservation, directing the funeral and defraying expenses of funeral himself or out of the testator's effects; making an inventory of his property, feeding his cattle, repairing his house, or providing necessaries for his

children, for these are offices merely of kindness and charity.

See *Camden v. Fletcher*, 4 M. & W. 378; *Serle v. Watworth*, 4 M. & W. 9.

**174.** If another man takes the goods of the deceased and sells and gives them to me, this shall charge him as executor of his own wrong, but not me, unless there be collusion. Collusive sale.

*Hill v. Curtis*, L. R. 1 Eq. 90.

**175.** Again, if a person sets up in himself a colourable title to the goods of the deceased, as where he claims a lien on them, though he may not be able to make out his title completely, he shall not be deemed an executor de son tort. So, if a man lodge in my house, and die there, leaving goods therein behind him, I may keep them until I can be lawfully discharged of them without making myself chargeable as executor in my own wrong, or if I take the goods of the deceased by mistake supposing them to be my own, this will not make me an executor of my own wrong. Colourable title.

*Flemings v. Jarratt*, 1 Esp. N. P. C. 336.

**176.** Likewise a man who possesses himself of the effects of the deceased under the authority of and as agent for the lawful executor, cannot be charged as executor de son tort.

*Sykes v. Sykes*, L. R. 5 C. P. 113.

**177.** The question whether executor de son tort or not is a conclusion of law, and not to be left to a jury, whether the party did certain acts, is a question for the jury, but when these facts are established the result from them is a question of law. Question is one of law.

*Padget v. Priest*, 2 T. R. 99.

**178.** When a man has so acted as to become in law executor de son tort, he thereby renders himself liable not only to an action by the rightful executor or administrator, but also to be sued as executor by a creditor of Consequences of intermeddling.

the deceased or by a legatee. An executor *de son tort* has all the liability though none of the privileges that belong to the character of executor.

See *Webster v. Webster*, 10 Ves. 93; *Coote v. Whittington*, L. R. 16 Eq. 534.

Form of judgment.

**179.** A judgment against a man found executor *de son tort* after a defence that he was not executor, would be that the plaintiff do recover the debt and costs to be levied out of the assets of the testator, if the defendant have so much, or if not, then out of the defendant's own goods.

How far executor *de son tort* protected.

**180.** Though an executor *de son tort* cannot by his own wrongful acts acquire any benefit, yet he is protected in all acts not for his own benefit which a rightful executor may do. Accordingly, if he pleads properly he is not liable beyond the extent of the goods which he has administered. Therefore, in an action by a creditor of the deceased under a defence that the property has been lawfully and completely administered, he shall not be charged beyond the assets which came into his hands.

*Yardley v. Arnold*, Carr. & M. 434.

No right of retainer.

**181.** An executor *de son tort* cannot give in evidence or successfully claim a retainer for his own debt; for otherwise the creditors of the deceased would be running a race to take possession of his goods without taking administration to him.

Executor *de son tort* obtaining administration.

**182.** Yet, if an executor *de son tort* afterwards, even *pendente lite*, obtained administration, he might retain, for it legalized those acts which were tortious at the time.

Old Cases cited, Wms. 9th ed. p. 220.

Liability at suit of lawful representative.

**183.** With respect to the liability of an executor *de son tort* at the suit of the lawful representative of the deceased, there are several authorities to show that if the rightful executor or administrator bring an action the executor *de son tort* may give in evidence and in

mitigation of damages payments made by him in the rightful course of administration upon this ground that the payments, which are thus, as it were, recouped in damages, were such as the lawful executor or administrator would have been bound to make.

*Mountford v. Gibson*, 4 East. 451.

**184.** This recouping in damages can only be allowed Requisites. to the executor de son tort in cases where there are sufficient assets to satisfy all the debts of the deceased.

*Elworthy v. Sandford*, 3 Hurl. & C. 330.

**185.** All the lawful acts which an executor de son What acts tort doth are good. This must be understood in a case are good. where payments are made by one who is proved to have been acting at the time in the character of executor, and not of a mere solitary act of wrong in the very instance complained of by one taking upon himself to hand over the goods of a deceased to a creditor.

*Mountford v. Gibson*, ut sup.

**186.** The act of an executor de son tort is good Act of against the true representative of a deceased only where executor de son tort. it is lawful, and such an act as the true representative was bound to perform in the due course of administration.

*Buckley v. Barber*, 6 Exch. 164.

See *McDade v. Dajoe*, 15 U. C. R. 386; *Bain v. McIntyre*, 17 U. C. C. P. 500.

## CHAPTER VIII.

## PROBATE.

Effect of  
declaration of probate or administration.

**187.** A probate is merely operative as an authenticated evidence, and not at all as the foundation of the executor's title, for he derives all his interest from the will itself, and the property of the deceased vests in him from the moment of the testator's death. Therefore the probate is said to have relation to the time of the testator's death.

*Ingle v. Richards*, 28 Beav. 366.

Extent of operation of probate.

**188.** Equity considers an executor as trustee for the legatees in respect to their legacies, and in certain cases as trustee for the next of kin of the undisposed of surplus, and as all trusts are the peculiar objects of equitable cognizance, the High Court of Justice will compel the executor to perform these his testamentary trusts with propriety. Therefore, while the seal of the Court of Probate is conclusive evidence of the factum of a will, the High Court of Justice has an equitable jurisdiction of construing the will in order to enforce a proper performance of the trusts of the executor.

Executor considered a trustee.

Matters held to be conclusively proved.

**189.** It is a legal consequence of the exclusive jurisdiction of the Court of Probate in deciding on the validity of wills of personalty and granting administration, that its sentences pronounced in the exercise of such exclusive jurisdiction should be conclusive evidence of the right directly determined. Hence, a probate even in common form unrevoked is conclusive both in the Courts of Law and Equity as to the appointment of executor and the validity and contents of a will, and it cannot be impeached by evidence even of fraud.

*Griffiths v. Hamilton*, 12 Ves. 307.

**190.** Therefore, it is not allowable to prove that another person was appointed executor, or that the testator was insane, or that the will of which the probate was granted was forged, for that would be directly contrary to the seal of the Court in a matter within its exclusive jurisdiction. So the probate of a will conclusively establishes in all Courts that the will was executed according to the law of the country where the testator was domiciled.

*Whicker v. Hume*, 7 H. L. 124.

**191.** Upon this principle it was decided that payment of money to an executor who has obtained probate of a forged will is a discharge to the debtor of the debt.  
Payment of money to an executor under forged will.

*Prosser v. Wagner*, 1 C. B. N. S. 289.

**192.** When there is a question whether particular legacies given by a will are cumulative or substituted, it is often determined by the circumstance of the bequest having been given by distinct instruments. In such a case if the probate has been granted as of a will and codicil, that is conclusive of the fact of their being distinct instruments though written on the same paper.  
Probate of instruments as distinct.

*Baillie v. Butterfield*, 1 Cox. 392.

**193.** The probate is also conclusive as to every part of the will in respect to which it has been granted. Though the Courts are bound to receive as testamentary a will in all its parts, which has been proved in the proper Surrogate Court, yet they may in certain cases affect with a trust or particular legacy or a residuary bequest which has been obtained by fraud. For instance, if the drawer of a will should fraudulently insert his own name instead of that of a legatee, he would be considered in equity as a trustee for the real legatee.  
A bequest obtained by fraud may be declared a trust.

*Marriott v. Marriott*, 1 Stra. 666; *Allen v. McPherson*, 5 Beav. 469.

**194.** An executor before he proves the will in the Probate Court may do almost all the acts which are incident to his office, except only some of those which relate to suits. Thus, he may seize and take into his hands  
What acts an executor may do before probate.



any of the testator's effects, and he may enter peaceably into the house of the heir for that purpose, and take specialties and other securities for the debts due to the deceased. He may pay or take releases of debts due to the estate, and he may receive or release debts which are owing to it, and distrain for rent due to the testator, and if before probate the day occur for payment upon bond made by or to the testator, payment must be made by or to the executor though the will be not proved upon like penalty as if it were. So he may sell, give away or otherwise dispose at his discretion of the goods and chattels of the testator before probate; he may assent to or pay legacies, and he may enter on the testator's term of years. Although an executor dies after any of these acts done, without proving the will, yet these acts so done stand firm and good.

See Wms. p. 250.

Probate  
necessary  
to prove  
appoint-  
ment.

**195.** Although an executor may, before probate, by grant or assignment of property, give a valid title to an assignee or legatee, yet if it is necessary to support that title by adducing it from the assignment or consent, it also becomes requisite to show the right to make assignment or give the assent, which can only be effected by producing the probate or other evidence of the admission of the will in the Surrogate Court. For the fact of a particular person having been appointed executor to another can be proved by no other means.

Payment  
of pur-  
chase  
money to  
executor.

**196.** Although an executor can before probate make an assignment and give a receipt for purchase-money, which are binding, yet a purchaser is not bound to pay the purchase money until probate, because till the evidence of title exists the executor cannot give a complete indemnity.

*Newton v. Met. Ry. Co.*, 1 Dr. & Sm. 583.

Actions  
may be  
maintain-  
ed before

**197.** An executor cannot maintain actions before probate, unless such as are founded on his actual possession, for in actions where he sues in his representative

character he may be compelled by the course of pleading to produce the letters testamentary at the trial or in some cases by an application to the Court at an earlier stage of the cause. In those actions where he sues in his individual capacity, relying on his constructive possession as executor, although he does not describe himself as executor in his pleading, yet, generally speaking, it will be necessary for him to prove himself executor at the trial, which he can only do by showing the probate.

*Tarn v. Com. Bank of Sydney*, 12 Q. B. D. 294.

**198.** In cases where the executor has actually been possessed of the property before it came to the hands of the defendant, such possession is of itself sufficient without showing any title, to establish a *prima facie* case, either in replevin, trover or trespass, when the property has come to the defendant's hands or been converted by tort, or in debt or assumpsit when the defendant has acquired it by a contract with the executor.

*White v. Mullett*, 6 Exch. 713, 715.

**199.** Although an executor cannot maintain actions before probate, except upon his actual possession, yet he may advance in them as far as that step where the production of the probate becomes necessary, and it will be sufficient if he obtains the probate in time for that exigency.

*Webb v. Adkins*, 14 C. B. 401.

**200.** On the other hand, if he have elected to administer he may also, before probate, be sued at law or in equity by the deceased's creditors, whose rights shall not be impeded by his delay, and to whom, as executor *de jure* or *de facto*, he has made himself responsible.

**201.** The only person by whom the testament can be proved is the executor named in it, whom the Court of Probate may, as above stated, cite to the intent to prove the testament, and take upon him the execution thereof, or else refuse the same. This the Court may do

not only ex officio, but at the instance of any party having an interest, which interest is proved by the oath of the party.

Will destroyed or suppressed

**202.** Where the will is destroyed or concealed by the executor, if it be proved plainly, the legatee can go to the High Court of Justice for a decree upon the ground of spoliation or suppression, although the general rule is to cite the executor in the Surrogate Court.

Person other than executor with will in possession may be cited.

**203.** If the executor has not the will in his possession, but some other person, then such other person may be compelled to exhibit the same, and it is sufficient to prove that he once had it, for he is still presumed to have it, unless he affirms upon oath that it is not in his possession.

No solicitor's lien on will.

**204.** The lien of an attorney or solicitor does not extend to the original will executed by his client, and he cannot refuse the production of it.

*Georges v. Georges*, 18 Ves. 204.

Disputed wills should be lodged in Court.

**205.** Disputed wills ought to be lodged with the Registrar of the Surrogate Court for custody. Practitioners have no right to keep wills in their possession. The expense necessary to get a will out of the hands of a party must fall upon the person who withholds it.

*Cunningham v. Seymour*, 2 Phillim. 250.

If testator alive will may not be proved, only recorded.

**206.** If a testator be yet living, the Judge may not proceed to the proving of his testament at the petition either of the executor or any other, except at the request of the testator himself, and at his petition the testament may be recorded and registered among other wills, but it is not to be delivered forth under the seal of the Court with the probate, because it is of no force so long as the testator lives, who also may revoke or alter the same at any time before his death.

Time for probate.

**207.** The time after the testator's death when the will is to be proved is somewhat uncertain, and left in

the discretion of the Judge, according to the distance of the place, the weight of the will, the quality of the executors and legatees, and other circumstances incident thereto.

**208.** The production of a testamentary paper may be compelled as follows:

26. (1) Whether any suit or other proceeding is or is not pending in the Court with respect to any probate or administration, every Surrogate Court may, on motion or petition, or otherwise in a summary way, order any person to produce and to bring before the registrar of the Court, or otherwise as the Court may direct, any paper or writing being or purporting to be testamentary, which may be shown to be in the possession or under the control of such person.

Order to produce any instrument purporting to be testamentary.

(2) If it is not shown that any such paper or writing is in the possession or under the control of such person, but if it appears that there are reasonable grounds for believing that he has knowledge of any such paper or writing, the Court may direct such person to attend for the purpose of being examined in open Court, or upon interrogatories respecting the same, and such person shall be bound to answer such questions or interrogatories, and if so ordered to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default in not attending, or in not answering such questions or interrogatories, or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit in the Court, and had made such default; and the costs of such motion, petition, or other proceeding, shall be in the discretion of the Court. R. S. O. 1897, c. 59, s. 26 (s. 24, R. S. O. 1887, c. 59).

**209.** A testament may be proved in two ways, either in common form or by form of law, which latter mode is also called the solemn form, and sometimes proving per testes.

Two ways of proving wills.

**210.** A will is proved in common form when the executor presents it before the Judge, and in the absence of and without citing the parties interested, produces witnesses to prove the same, who, testifying by their oaths that the testament exhibited is the true, whole and last will and testament of the deceased, the Judge thereupon, and sometimes upon less proof, annexes his probate and seal thereto.

Proving will "in common form."

Wills  
made after  
1st Janu-  
ary, 1874,  
if attesta-  
tion clause

**211.** With respect to wills made on and after the 1st January, 1874, if a will be perfect on the face of it, and there is an attestation clause reciting that the solemnities required by the Wills Act have been complied with, probate in common form may be obtained upon the oath of the executor alone.

If no at-  
testation  
clause.

**212.** But if there is no attestation clause, or if there is a clause which does not state the performance of all the prescribed solemnities, an affidavit is required from one of the subscribing witnesses by which it must appear that the will was executed in compliance with the statute. But this requisite may be dispensed with if the witnesses, after diligent enquiry, are not forthcoming.

*In the goods of Dickson, 6 Notes of Cas. 278.*

Probate of  
imperfect  
instrument

**213.** Where probate in common form is sought of an instrument which on the face of it is imperfect, whether the imperfection consist of it being incomplete in the body of it or merely in the execution, as in the want of signature or by subscribing witnesses, as where there is an attestation clause, two things are required by the Court before probate will be allowed, first, there must be affidavits stating facts which, if established in solemn form of law, that is by statements of claim and defence, would sustain the instrument as a will in case it were disputed, and, second, there must be consent implied or expressed from all parties interested.

Proof of  
will in  
solemn  
form.

**214.** When a will is to be proved in solemn form it is requisite that such persons as have interest, that is to say, the widow and next of kin of the deceased, to whom the administration of his goods ought to be committed if he dies intestate, should be cited to be present at the probate and approbation of the testament.

*Wms. p. 275.*

Difference  
between  
common  
form and  
solemn  
form.

**215.** The difference between the common form and the solemn form with respect to citing the parties interested, works this diversity of effect, namely, that the executor of a will proved in common form may at any time

within thirty years be compelled by a person having an interest to prove it per testes in solemn form. So that if the witness be dead in the meantime, it may endanger the whole testament. Whereas a testament being proved in solemn form of law the executor is not to be compelled to prove the same any more, and although all the witnesses afterwards be dead, the testament still retains its full force.

**216.** Therefore, not only are wills proved in solemn form\* at the instance of persons who desire to invalidate them, but the executor himself may, and sometimes does, for greater security propound and prove the will in the first instance per testes of himself, citing the next of kin, and all others pretending interest in general, to see proceedings which, being done, the will shall not afterwards be set aside, (provided there be no irregularity in the process) when the witnesses are dead.

Executor may prove will in solemn Form.

*Lister v. Smith*, 3 Sw. & Tr. 53.

**217.** Where it appears from the affidavits the attestation clause being imperfect, that the will was not properly attested by the witnesses under the statute, the Court cannot decree administration to pass to the effects of the deceased as dead intestate; all that the Court will do in such cases is to reject the prayer for probate, leaving the parties to take out administration, if they think proper, as though the Court declines to grant probate, the will may be propounded and established.

Where it appears that will was not properly attested.

*In the goods of Ayling*, 1 Curt. 913.

**218.** If a will dated after the 1st January, 1874, has upon the face of it any unattested obliteration, interlineation or alteration, an affidavit is required showing whether they were made before or after the execution of the will.

Unattested obliteration, etc.

\* A will is proved in common form when the executor presents it before the Judge, and in the absence and without citing the parties interested, produces witnesses to prove the same and testifying by their oaths that the testament exhibited is the true, whole and last will and testament of the deceased, the Judge thereupon, and sometimes upon less proof, does annex his probate and seal thereto.

Probate of  
will issued  
as altered  
by testa-  
tor.

**219.** Where alterations are satisfactorily shown to have been made before the execution, it is usual to engross the probate copy of the will fair, inserting the words interlined in their proper places, and omitting words struck through or obliterated. But in cases where the construction of the will may be affected by the appearance of the original paper, the Court will order the probate to pass in fac simile. A fac simile probate of a will is conclusive in the High Court, that the will was in that state, that is, that the testator duly executed it with the alterations or cancellations upon it.

*Gann v. Gregory*, 3 DeG. M. & G. 777.

Costs out  
of estate.

**220.** It is only under special circumstances that costs are to be directed to be paid out of a testator's estate. The rules are laid down as follows:

If the cause of litigation takes its origin in the fault of the testator or those interested in the residue, costs may be properly paid out of the estate. 2nd. If there be sufficient and probable ground looking to the knowledge and means of knowledge of the opposing party to question either the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent.

*Mitchell v. Gard*, 3 Sw. & Tr. 275.

Partial  
probate.

**221.** A will may be in part admitted to probate and in part refused. Thus, if the Court is satisfied that a particular clause has been inserted in a will by fraud, without the knowledge of the testator in his lifetime, or by forgery after his death, or if he has been induced by fraud to make it a part of his will probate will be granted of the instrument with the reservation of that clause.

*Allen v. McPherson*, 1 H. L. 161.

Probate  
cannot be  
altered.

**222.** The Court has under no circumstances power to make any alterations in papers of which probate has been granted.

**223.** If a testament is made in writing and is afterwards lost by some casualty, and there be two unexceptionable witnesses who did see and read the testament written, and who remember its contents, these two witnesses so deposing to the tenor of the will are sufficient for the proving thereof in form of law. In such cases the Court will grant probate of the will as contained in the depositions of the witnesses.

*Trevcljan v. Trevcljan*, 1 Phillim. 154.

**224.** Probate of a will cannot be granted to an executor while a contest subsists about the validity of a codicil, for that being undetermined it does not appear what is the will, and the executor cannot take the common oath.

If codicil in litigation no probate allowed.

See *In the goods of Roberts*, L. R. 3 P. & D. 110.

**225.** When a will is proved the original is deposited in the registry, and a copy is made out under the seal of the Court and delivered to the executor, together with a certificate of its having been proved, and such copy and certificate are usually styled the probate.

Probate, how issued

See *Sproule v. Watson*, 23 A. R. 692, *Book v. Book*, 15 O. R. 119.

**226.** If a will be in a foreign language the probate is granted of a translation of the same by a notary public. But other Courts are not bound by it, and may themselves correct any inaccuracy in it.

Foreign language.

Wms. 9th Ed. p. 325.

**227.** Where the probate is lost the Court merely grants an exemplification of the probate from its own record, and the exemplification is evidence of the will having been proved.

Lost probate.

**228.** The probate may be revoked either on suit by citation; for instance, where the executor after proof in common form is cited to prove the will in solemn form, or even after proof in solemn form where the probate is shown to have been obtained by fraud, or the will of

Revocation of probate.



which it has been granted is proved to have been revoked or a later will made, or on appeal to a higher tribunal.

**229.** The following statutory provisions should here be noted :

Where a will affecting real estate is proved in solemn form or is the subject of contentious proceedings the heirs etc. may be cited.

54. Where proceedings are taken under this Act for proving a will in solemn form, or for revoking the probate of a will on the ground of the invalidity thereof, or where in any other contentious cause or matter under this Act the validity of a will is disputed, unless the will affects only personal estate, the heir or heirs at law, devisees or other persons having or pretending to have any interest in the real estate affected by the will, may, subject to the provisions of this Act and to the rules and orders relating to Surrogate Courts heretofore in force, or hereafter to be made under this Act, be cited to see proceedings or be otherwise summoned in like manner as the next of kin or others having or pretending interest in the personal estate affected by a will should be cited or summoned, and may be permitted to become parties, subject to such rules and orders and to the discretion of the Court; but nothing herein contained shall make it necessary to cite the heirs at law, or other person having or pretending interest in the real estate of a deceased person, unless the Court, with reference to the circumstances of the case, directs the same to be done. R. S. O. 1897, c. 59, s. 54 (s. 51, R. S. O. 1887, c. 50).

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## CHAPTER IX.

## CO-EXECUTORS.

**230.** Co-executors, however numerous, are regarded in law as an individual person, and therefore the acts of any one of them in respect of the administration of the effects are deemed to be the acts of all; for they all have a joint and entire authority over the whole property. Hence a release of a debt by one of several executors is valid, and shall bind the rest. So, one of several executors may settle an account with a person accountable to the estate, and in the absence of fraud the settlement will be binding on the others though dissenting. So a grant or surrender of the term by one executor shall be equally available; the attornment of one shall be the attornment of the other. And the sale or gift by one of several executors of the goods and chattels of the deceased is the sale and gift of them all.

Wms. p. 816.

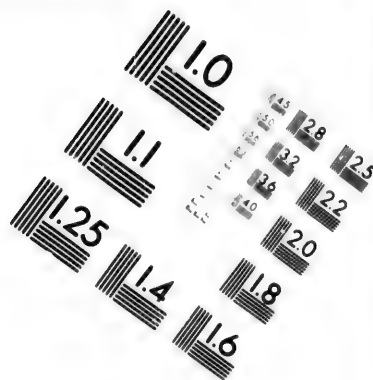
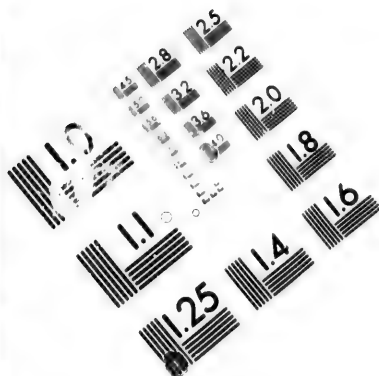
**231.** An assent to a legacy by one of several executors is sufficient. So if one of several executors be a legatee, his single assent to his own legacy will vest the complete title in himself.

Wms. old authorities, p. 819.

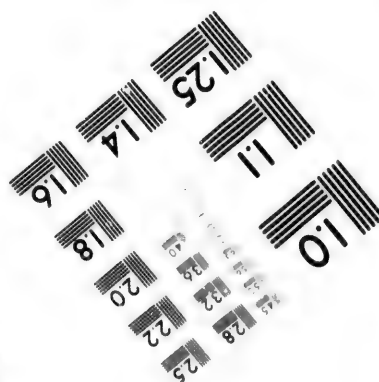
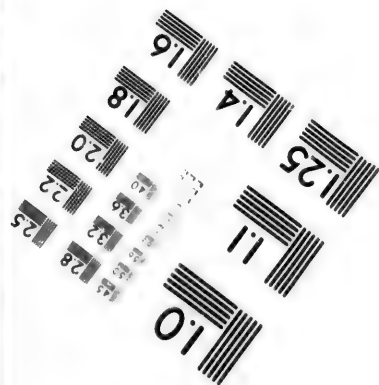
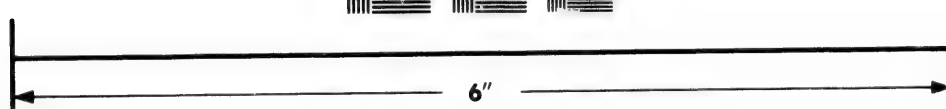
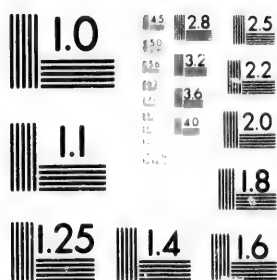
**232.** The act of one in taking possession of the testator's effects, real or personal, cannot create a new liability and impose a charge on the other personally and in his own individual character which, without such an Act, would never have existed. Therefore, if one executor takes possession of and uses a personal chattel, the other is not liable to the creditors for such an act of his co-executor.

Mortgage by one to the other. *Beatty v. Shaw*, 13 O. R.

21. Liability. *Archer v. Severn*, 13 O. R. 316; *Re Crouter*, 10 O. R. 159; *McCarter v. McCarter*, 7 O. R. 243; *Re Kirkpatrick*, 3 O. R. 361.



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Interest of  
co-  
executors.

**233.** If there be several executors or administrators, they are regarded in the light of an individual person. They have a joint and entire interest in the effects of the testator or intestate, including chattels real, which is incapable of being divided, and in case of death such interest shall vest to the survivor, without any new grant by the Surrogate Court. Consequently, if one of two executors or administrators grant or release his interest in the testator's or intestate's estate to the other nothing shall pass, because each was possessed of the whole before. So, if one of several executors release but his part of the debt, it has been held that the whole is discharged.

*Heath v. Clinton*, 12 M. & W. 632.

Effect of  
possession  
by one.

**234.** Since several executors have a joint and entire interest in all the goods of their testator, including chattels real, it follows that the act of one in possessing himself of the effects, is the act of the others, so as to entitle them to a joint interest in possession and a joint right of action if they are afterwards taken away.

*Nation v. Tozer*, 1 Cr. Mees. & R. 174.

Death of  
one of  
several  
executors.

**235.** If one of several executors dies before the joint interest in the residue is severed, where the executors are entitled to such residue the share of the executor dying will survive to his common executors, and the executors of his own executors or administrators.

Of one of  
several  
adminis-  
trators.

**236.** One of several administrators stands on the same ground and foundation with one of several executors.

*Stanley v. Berne*, 1 Hagg. 222.

Survival  
of powers.

**237.** The power of an executor is not determined by the death of his co-executor, but survives to him. And so, likewise, if administration has been granted to two and one dies, the other will be sole administrator and all the power of the office will survive to him.

*Hudson v. Hudson*, Cas. temp. Talb. 127.

**238.** The ordinary functions incident to the office of executor may be exercised by one of several appointed executors, although the others renounce; but at common law where a power was given to executors to sell land, and one of them refused the trust, it was clear that the others could not sell, but the Statute 21 Hen. VIII. cap. 4, provides that where lands are willed to be sold by executors and part of them refuse to be executors and to accept the administration of the will, all sales by the executors that accept the administration shall be as valid as if all the executors had joined.\*

**239.** If one of two executors dies the office survives to his co-executor. A naked authority given to several cannot survive. Therefore if a man devises his lands to A. for life, and that after his decease the estate shall be sold by the executors, naming them as B. and C., his executors, or by B. and C., who are not named executors; in that case if one of them die during the life of A. the other cannot sell, because the words of the testator would not be satisfied.

Co. Lit. 113a.

**240.** If there are several executors appointed by the will they must all join in bringing actions, even though some of them be infants, or have not proved the will.

**241.** Where there are several executors they may agree that one of them shall hold the land devised to them in trust at a fixed rent, and if the rent falls into arrears he may be distrained upon in respect of it.

*Corper v. Fletcher*, 34 L. J. (N. S.) Q. B. 187.

**242.** In this connection, it may be well to call attention here to the following section (3) of the Trustee Act, R. S. O. 1897, chapter 129. The section will come again under consideration in dealing with the liabilities of Executors.

\* The special powers of sale conferred upon executors by R. S. O., 1897, c. 129, *The Trustee Act*, may be exercised by a surviving executor.

Every trust instrument to be deemed to contain a clause for the indemnity and reimbursement of the trustees  
Imp. Act, 22-23 V. c. 35 s. 31.

3. Every deed, will, or other document, creating a trust, either expressly or by implication, shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words, or to the effect following, that is to say:—"That the trustees or trustee, for the time being, of the said deed, will or other instrument, shall be respectively chargeable only for such moneys, stocks, funds and securities as they shall respectively actually receive, notwithstanding their respectively signing any receipt for the sake of conformity, and shall be answerable and accountable only for their own acts, receipts, neglects or defaults, and not for those of each other, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited, nor for the insufficiency or deficiency of any stocks, funds or securities, nor for any other loss, unless the same shall happen through their own wilful default respectively; and also that it shall be lawful for the trustees or trustee for the time being, of the said deed, will, or other instrument, to reimburse themselves or himself, or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers of the said deed, will or other instrument." R. S. O. 1887, c. 110, s. 2.

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## CHAPTER X.

APPLICATION IN CASES WHERE SUCCESSION  
DUTIES ARE PAYABLE.

**243.** In certain cases, which will be stated in a subsequent part of this book, Succession Duties are required by the Crown to be paid for the purposes of the Province. In such cases, information is required and security taken from Executors and Administrators as directed by the following sections of the Ontario Succession Duties Act. R. S. O. 1897, chapter 24.

5. (1) An executor or administrator applying for letters probate, or letters of administration to the estate of a deceased person, shall, before the issue of letters probate or administration to him, make and file with the Surrogate Registrar a full, true, and correct statement under oath shewing:

(a) A full itemized inventory of all the property of the deceased person, and the market value thereof, and

(b) The several persons to whom the same will pass under the will or intestacy, and the degree of relationship, if any, in which they stand to the deceased;

and the executor or administrator shall before the issue of letters probate, or letters of administration, deliver to the Surrogate Registrar a bond in a penal sum equal to ten per centum of the sworn value of the property of the deceased person liable, or which may become liable, to succession duty, executed by himself and two sureties, to be approved by the Registrar, conditioned for the due payment to Her Majesty of any duty to which the property coming to the hands of such executor or administrator of the deceased may be found liable. Ont. Stats., 1892, c. 6, s. 5 (1); ditto, 1896, c. 5, s. 8.

(2) This section shall not apply to estates in respect of which no succession duty is payable. Ont. Stats., 1892, c. 6, s. 5 (2).



## CHAPTER XI.

## ERRONEOUS PRESUMPTION OF DEATH.

Cases where death has been erroneously presumed.

**244.** In cases where death has been presumed, and it afterwards appears that the presumption was erroneous, persons who have acted as Executors or Administrators are protected by the following section of R. S. O. 1897, c. 131.

Protection of persons acting as executors and administrators to persons supposed to be deceased.

1. Where any one has been or is hereafter appointed, by a Court having jurisdiction in that behalf, administrator of the estate of any person who on account of absence for seven years, or for any other reason, has been presumed to be dead, or where probate of a will made by any such person has been or shall be granted, by such Court, all acts done under the authority of such appointment or probate, shall, notwithstanding it may thereafter appear that the presumption of death was erroneous, be as valid and effectual as such acts would have been had such person been dead; but the person erroneously presumed to be dead, shall, subject to the provisions of sections 3 and 4, have the right to recover from the person acting as executor or administrator any part of the estate remaining in his hands undistributed, and no more; and shall, subject to the provisions of the Statutes of Limitations, be entitled to recover from any one who received any portion of his estate as one of his next of kin, or as a devisee, legatee or heir, or as the husband or wife of such person, the portion so received, or the value thereof. Ont. Acts, 1890, c. 29, s. 1.

Erroneously supposed intestacy or discovery of later will.

**245.** In cases where an administration has been granted on some erroneous supposition of intestacy of the deceased, or on the discovery of a later will than that of which probate was granted, or of some other cause for issuing a substituted probate, the following provisions are made for the confirmation of acts done under the superseded probate or administration, and for the better protection of all parties concerned. (Section 2, same Act). Compare also paragraph 152, supra, and sections 63 and 64 of Surrogate Act there set out.

2. Where a will is admitted to probate, or a grant of administration is made with will annexed, or on account of supposed intestacy, by a Court having jurisdiction in that behalf, all acts done under the authority of such will or grant of administration shall, notwithstanding it may afterwards appear that the deceased had left a will, or left a will which superseded that of which probate was granted, or which was annexed to the said letters, or notwithstanding that it appears that the will admitted to probate or administration was not duly executed, or was for any reason invalid, be as valid and effectual as such acts would have been if such will had been the last will of the deceased, and had been duly executed and had been valid, or in case of administration as on intestacy as valid as such acts would have been if the deceased had died intestate; but upon the revocation of the grant of probate or administration, the new personal representative of the deceased shall, subject to the provisions of sections 3 and 4, have the right to recover from the person acting as executor or administrator as aforesaid, any part of the estate remaining in his hands undistributed, and no more; and shall, subject to the provisions of the Statutes of Limitations, be entitled to recover from any one who erroneously received any portion of the estate of the deceased as one of his next of kin, or as a devisee, legatee, or heir, or as the husband or wife of the deceased the portion so received or the value thereof. <sup>Protection of personal representatives acting on supposed intestacy of deceased.</sup> Ont. Acts, 1890, c. 29, s. 2.

3. The said executor or administrator shall have the right to retain out of any amount remaining in his hands undistributed his proper costs and expenses in the administration of the estate. <sup>Costs of executors or administrators.</sup> Ont. Acts, 1890, c. 29, s. 3.

4. Nothing herein contained shall protect any person acting as administrator or executor where such person has been privy to any fraud by means of which the grant of administration or probate was obtained, or in cases arising under section 1, in respect of anything done after he becomes aware that the person who was presumed to be dead is alive, or in cases arising under section 2, that the will was not duly executed, or for some other reason was invalid, unless the thing so done was in pursuance of a contract for valuable consideration made before the said executor or administrator was aware to the effect aforesaid. <sup>Persons acting fraudulently.</sup> Ont. Acts, 1890, c. 29, s. 4.

## CHAPTER XII.

## APPOINTMENT OF NEW TRUSTEE.

Continu-  
ance of  
office of  
executor.

**246.** This part of the subject will not be complete without setting forth the following sections (4 and 5) of The Trustee Act, R. S. O. 1897, c. 129. It will be seen that they provide for the continuance of the office of executor.

Appoint-  
ment of  
new trust-  
tee. Imp.  
Act, 23-24  
V. c. 145.

4. (1) Where a trustee, either original or substituted, and whether appointed by the High Court or otherwise, dies, or desires to be discharged from, or refuses, or becomes unfit or incapable, to act in the trusts or powers in him reposed, before the same have been fully discharged and performed, it shall be lawful for the person or persons nominated for that purpose by the deed, will, or other instrument creating the trust (if any), or if there be no such person, or no such person able and willing to act, then for the surviving or continuing trustees or trustee for the time being, or the acting executors or executor, or administrators or administrator, of the last surviving and continuing trustee, or for the last retiring trustee, by writing, to appoint any other person or persons to be a trustee or trustees, in place of the trustee or trustees dying, or desiring to be discharged, or refusing, or becoming unfit, or incapable to act as aforesaid; and so often as any new trustee or trustees is or are so appointed as aforesaid, all the trust property (if any), which for the time being is vested in the surviving or continuing trustees or trustee, or in the heirs, executors, or administrators of any trustees or trustee, shall, with all convenient speed, be conveyed, assigned and transferred, so that the same may be legally and effectually vested in such new trustee or trustees, either solely or jointly with the surviving or continuing trustees, or a surviving or continuing trustee, as the case may require; and every new trustee to be appointed as aforesaid, as well before as after such conveyance, assignment or transfer as aforesaid, and also every trustee appointed by the High Court, either before or after the passing of this Act, shall have the same powers, authorities and discretions, and shall in all respects act as if he had originally been nominated a trustee by the deed, will, or other instrument creating the trust.

(2) The power of appointing new trustees hereinbefore contained, may be exercised in cases where a trustee, nominated in a will, has died in the lifetime of the testator. R. S. O. 1887, c. 110, s. 3.

5. (1) Where an instrument by which a new trustee is appointed Vesting of to perform any trust contains a declaration by the appointor to the trust property in new effect that any estate or interest in any land subject to the trust, or in or continu- any chattel so subject, or the right to recover and receive any debt ing trust- or other thing in action so subject, shall vest in the persons, who, by out coven- tees with- virtue of such instrument, become and are the trustees for perform- ants. Imp. Act, 44-45, assignment, operate to vest in those persons, as joint tenants, and 34. V. c. 41, s. for the purposes of the trust, that estate, interest or right.

(2) Where an instrument by which a retiring trustee is dis- charged under this Act contains such a declaration as is in this section mentioned by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates.

(3) This section does not extend to any share, stock, annuity, or property only transferable in books kept by a company or other body, or in manner prescribed by or under an Act of Parliament or of this Legislature.

(4) For purposes of registration of an instrument in any registry, the person or persons making the declaration shall be deemed the convey- ing party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

(5) This section applies only to instruments executed after the 1st day of July, 1886. R. S. O. 1887, c. 110, s. 4.

As to section 4 above set out, Mr. Lewin makes the following remarks:

Lord Cranworth's Act (23 & 24 Vict. c. 145), provided against the omission of a power of appointment of new trustees in any instrument of trust, and also against defects in the power, by enacting generally by the 27th section, that "whenever any trustee, either original or substituted, and whether appointed by the Court of Chancery or otherwise, should die or desire to be discharged from, or refuse or become unfit or incapable to act in the trusts," it should be lawful for the person nominated for that purpose by the instrument creating the trust, or if there should be no such person, or he

should be unable or unwilling to act,\* then "for the surviving or continuing trustees, or trustee for the time being, or the acting executor or administrator of the surviving and continuing trustee, or for the last retiring trustee, by writing, to appoint any other person or persons to be a trustee or trustees," and the Act gave the usual directions for vesting the trust estate (s. 27); and the following section made the Act apply to the case of a trustee dying in the testator's lifetime. But it will be observed that the Act did not provide for the case of a trustee going abroad, and it cannot be safely assumed that the word "refuse" was meant to include a disclaimer (for a disclaiming trustee never was a trustee), (a), and its operation was by the 34th section of the Act restricted to instruments inter vivos executed after the passing of the Act (28th Aug., 1860), and to wills and codicils made, conformed or revived, after the date.

It has been held (b) that the donee of the power under this Act could appoint two trustees in the place of an only trustee appointed by the settlor's will. The above provisions of Lord Cranworth's Act were, however, repealed by the Conveyancing and Law of Property Act, 1881, and their place is now supplied by s. 10 of The Trustee Act, 1893.

\* E.g., where the power was vested in husband and wife who were living apart and unable to agree: *Re Shepherd's Trusts*, W. N. 1888, p. 234.

(a) *Vicomtesse D'Adhemar v. Bertrand*, 35 Beav. 10; *Re Jackson's Trusts*, 18 L. T. N. S. 80.

(b) *Re Breary*, W. N. 1873, p. 48.

## PART II.

### CHAPTER I.

#### PROPERTY DEVOLVING UPON EXECUTORS AND ADMINISTRATORS UNDER THE DEVOLUTION OF ESTATES ACT.

**247.** In Ontario, before the first day of July, 1886, Devolution before 1st July, 1886. on which date the Devolution of Estates Act came into effect, the law with respect to the estate which an executor or administrator had in the property of the deceased, was as follows:

In the goods of the deceased the executor or administrator had an estate, as such, in *auter droit* as the minister or dispenser of the goods of the dead. All goods and chattels, real and personal, went to the executor or administrator. "By the laws of this realm," says Swinburne, "as the heir hath not to deal with the goods and chattels of the deceased, no more hath the executor to deal with the lands, tenements and hereditaments." In other words, both at law and in equity, the whole personal estate of the deceased vested in the executor or administrator.

**248.** These distinctions, as far as they relate to the devolution of the estate of a testator or intestate upon his executor or administrator, are abolished. They may and do still exist in ascertaining the rights of the parties interested in the estate between themselves; but the law as to devolution of an estate upon an executor or administrator is now contained in the following sections of the Devolution of Estates Act (R. S. O. 1897, c. 127): Devolution since 1st July, 1886.

2. Sections 3 to 10, inclusive, of this Act shall apply only to Application of s. s. 3-10.  
the estates of persons dying on and after the 1st day of July, 1886.  
R. S. O., 1887, c. 108, s. 2.

" In the main they seem to have been taken from an Act of the Province of New South Wales, No. 20 of 26 Viet. See *Plumley v. Shepherd*, 64 L. T. N. S. 94; (1891) A. C. 244; *Martin v. Mager*, 18 A. R. 388.

Estates to which s. s. 3-10 apply. 3. Subject as above this and the next seven sections of this Act shall apply:

(a) To all estates of inheritance in fee simple, or limited to the heir as special occupant, in any tenements or hereditaments in Ontario, whether corporeal or incorporeal.

(b) To chattels real in Ontario.

(c) To all other personal property of any person who has died domiciled in Ontario.

Proviso. Provided that all real or personal property comprised in any disposition made by will in exercise of a general testamentary power of appointment shall be deemed to be within the provisions of this section, if otherwise applicable. R. S. O. 1887, c. 108, s. 3.

Property to devolve on personal representative. 4. (1) All such property as aforesaid which is vested in any person, or is comprised in any such disposition as aforesaid made by him, shall, on his death, notwithstanding any testamentary disposition, devolve upon and become vested in his legal personal representatives from time to time, and subject to the payment of his debts; and so far as the said property is not disposed of by deed, will, contract, or other effectual disposition, the same shall be distributed as personal property not so disposed of is hereafter to be distributed. R. S. O. 1887, c. 108, s. 4 (part).

Power of personal representative over real property. 9. Subject, as hereinbefore provided, the legal personal representatives from time to time of a deceased person shall have power to dispose of and otherwise deal with all real property vested in them by virtue of the preceding sections of this Act, with all the like incidents, but subject to all the like rights, equities and obligations, as if the same were personal property vested in them. R. S. O. 1887, c. 108, s. 9.

Executors, etc., to have certain powers as to disposition of lands. 16. (1) Executors and administrators in whom the real estate of a deceased person is vested under this Act shall be deemed to have as full power to sell and convey such real estate for the purpose, not only of paying debts, but also of distributing or dividing the estate among the parties beneficially entitled thereto, whether there are debts or not, as they have in regard to personal estate; provided always, that where infants or lunatics are beneficially entitled to such real estate as heirs or devisees, or where other heirs or devisees do not concur in the sale, and there are no debts, no such sale shall be valid as respects such infants, lunatics, or non-concurring heirs or devisees, unless the sale is made with the approval of the Official Guardian appointed under the Judicature Act; same powers and duties as he has in the case of infants.

Proviso.  
Rev. Stat.  
c. 51.

(2) This section shall not apply to any administrator where the letters of administration are limited to the personal estate exclusive of the real estate, and shall not derogate from any right possessed by an executor or administrator independently of this Act. Ont. Acts, 1891, c. 18, s. 2.

19. Persons bona fide purchasing real estate from the executors or administrators of a deceased owner in manner authorized by this Act shall be entitled to hold the same freed and discharged from any debts or liabilities of the deceased owner not specifically charged thereon otherwise than by his will, and from all claims of his devisees and heirs at law as such, and the purchasers shall not be bound to see to the application of the purchase money. Ont. Acts, 1891, c. 18, s. 5.

20. Persons bona fide purchasing real estate from a devisee, whose devise has been assented to by the executors or administrators by deed, or by writing under their hand, or bona fide purchasing the real estate from any heir-at-law or devisee to whom the same has been conveyed by the executors or administrators, shall be entitled to hold the same freed and discharged from any unsatisfied debts and liabilities of the deceased owner, not specifically charged thereon otherwise than by his will, but nothing herein contained shall lessen or alter the rights of creditors as against the executors or administrators personally, or the rights of creditors as against any devisee, heir-at-law or next of kin in whom and for this purpose the Official Guardian aforesaid shall have the real estate of a deceased debtor has been vested by the executors or administrators, or permitted to become vested, to the prejudice of such creditors. Ont. Acts, 1891, c. 18, s. 6.

**249.** Section 8 of the Devolution of Estates Act is as follows:

8.—(1) Where infants are concerned in real estate which but for the preceding sections of this Act would not devolve on executors or administrators, no sale or conveyance shall be valid under this Act without the written consent or approval of the Official Guardian of Infants appointed under The Judicature Act, or, in the absence of such consent or approval, without an order of the High Court.

(2) The High Court may appoint the Local Judge of any county, or the Local Master therein, as Local Guardian of Infants in such county during the pleasure of the Court, with authority to give such written consent or approval as aforesaid instead of the Official Guardian; and the Official Guardian and Local Guardian shall be



subject to such general orders as the High Court may from time to time make in regard to their authority and duty under this Act. R. S. O. 1887, c. 108, s. 8.

*See also sections 17, 18, paragraph 259, below.*

Repetition  
of pro-  
vision as to  
infants.

**250.** As to infants there seems to be a repetition of provisions in sections 16 (1) and 8. Section 16 (1) says: "Executors and administrators in whom the real estate of a deceased person is vested under this Act"—that is R. S. O. c. 127—shall have power to sell, &c., provided that "where infants are beneficially entitled to such real estate as heirs or devisees," no sale is valid "as respects such infants" unless with the approval of the Official Guardian. Section 8 says: "Where infants are concerned in real estate, which but for the preceding sections of this Act would not devolve on executors or administrators." That is, where infants are concerned in real estate which under the old law did not devolve upon executors or administrators, but which under this Act does devolve upon them—then, the consent of the Official Guardian is required. What is the difference on this point between the two sections? Section 16 (1) seems to include section 8.

Meaning  
of sections  
above  
quoted.

**251.** The sections above quoted seem to mean that on the death of a person the estates specified devolve upon and become vested in the personal representatives of the deceased, subject to debts to be distributed as personal property. Such personal representatives may sell and convey such real estate, not only in order to pay debts, but also to divide such estate. In every case where infants or lunatics are interested the consent of the Official Guardian must be obtained before a sale can be made. Where there are adult heirs or devisees, and there are no debts, the personal representative can not without consent of the Official Guardian make a sale, if these adult heirs or devisees object. But none of these provisions shall "derogate from any right possessed by an executor independently of the Act."

**252.** The power of selling is a different matter from the duty to distribute. The persons who are to receive the property are defined by other sections of the Devolution of Estates Act.

Power of selling different from duty to distribute.

These sections will be stated later on when we come to deal with the subject of Distribution of Estates.

**253.** But on the question of the power to sell or mortgage the following judgments seem to shew conclusively that where executors derive a power of sale from a will they can exercise that power without reference to the Official Guardian.

Executors deriving power from will need not refer to Official Guardian.

*Mercer v. Nef,* 29 O. R. 680.

The testatrix devised land to her executor and trustee and his executors and administrators, upon trust to retain for his own use for life, and directed that after his decease, his executors or administrators should sell the land and divide the proceeds among her children.

Held, that this was a devise of the farm out and out as to the legal estate, the words "and his executors and administrators" being equivalent to "heirs and assigns," the executor had the right by virtue of s. 16 of the Trustee Act, R. S. O. c. 129, to mortgage for debts; and the mortgagee in such a mortgage, made within eighteen months of the death, was exonerated from all inquiry by s. 19.

In *re Bailey*, 12 Ch. D. 273, and In *re Tanqueray*, 20 Ch. D. 478, followed.

The Devolution of Estates Act, R. S. O. c. 127, does not apply to a case where the executor acts under the will and the provisions of the Trustee Act.

*In re Booth's Trusts*, 16 O. R. 429 — FERGUSON, J.

The testator, I assume died after the first day of July, 1886. The land in question is an estate of inheritance in fee simple, such as mentioned in sec. 3, paragraph (a) of the Act. This was vested in the testator at the time of his death, and it is within the meaning of the words, "All such property as aforesaid which is vested in any person," comprising the first and part of the second line of sec. 4 of the Act. The next following words of sec. 4, namely, "or is comprised in any such disposition as aforesaid," having reference to the last clause or provision of sec. 3 of the Act.

Then by section 4 of the Act, it is declared that property such as and in the position of the property in question shall, on the death of the person in whom it is vested, notwithstanding any testamentary disposition, devolve upon and become vested in his legal personal

representative from time to time and subject to the payment of his debts, and so far as it is not disposed of by deed, will, contract, or other effectual disposition, that it shall be distributed as personal property not so disposed of, is, after the passing of the Act, to be distributed.

The will in the present case gives the land to the executors, and gives them the power to sell it, and it would seem to me strange that the effect of the Act should be to diminish this power of sale or disposition. The 4th section says that notwithstanding any testamentary disposition it shall devolve upon and become vested in the legal personal representatives, and I think it did so devolve by force of the Act, and notwithstanding the will. The words "notwithstanding any testamentary disposition," are very general, and have, I think, as they are used in the Act, a meaning the most comprehensive; and I think the estate or interest in these lands that came to the executors they have under the provisions of the Act by devolution, that is, a passing to, or falling upon them as successors, and not by force of or under the provisions of the will, although in the distribution of the property the provisions and directions contained in the will must be followed so far as they extend.

Then the 8th section of the Act says that where infants are concerned in real estate, which, but for the preceding sections of the Act, would not "devolve" upon executors or administrators no sale or conveyance shall be valid under the Act without the written consent or approval of the official guardian of infants appointed under the Judicature Act, or in the absence of such consent or approval, without an order of the High Court. The difficulty I have is in respect to the words in this section "which, but for the preceding sections of this Act, would not devolve on executors or administrators." By these words it seems to have been assumed that there are cases or instances in which, apart from the preceding sections referred to, the estate might or would "devolve on" executors or administrators, which, according to the strict meaning of the word "devolve" could not, I think, leaving some peculiar estates out of consideration, be the case unless the executor or administrator happened to be heir-at-law (and even in such a case he would not take as executor or administrator), because the executor or administrator as such, before the Act took, and now, apart from the provisions of the Act, takes no estate or interest in the lands of the testator or intestate.

As to the lands, nothing fell upon him by succession. As to these, he could not in his capacity of executor or administrator, be a successor, or take by succession. Hence the estate could not devolve upon him according to the strict meaning of the word "devolve." By these considerations I am led to the conviction that the

Legislature did not use or intend to use the word "devolve" in the second line of the 8th section according to its strict and accepted meaning, but according to a meaning that is found in some of the authorities, namely, "to pass to another," and that what is really meant by this part of the 8th section is, that where infants are concerned in real estate, which, but for the preceding sections referred to, would not come to the executor or administrator by a devise, gift, or otherwise no sale or conveyance should be valid under the Act without the written consent, etc., and that this 8th section has no application to a case such as the present one in which the estate but for the provisions of the Act, would be vested in the executors by the will, which also gives them the power to sell the same; and for these reasons I am of the opinion that the consent in writing of the guardian mentioned in the 8th section is not, in the present case, necessary to validate a sale and conveyance of the lands by the executors.

*In re Koch and Wideman*, 25 O. R. 266. STREET, J.

Having in view the course of modern legislation, and the strength of the opinions which have been expressed in favour of the position that an express power of sale to executors, even though unaccompanied by an interest, survives and follows the office, I should be prepared to hold that the power of sale in this will was well executed by the surviving executor, even though it should be held to be a power without an interest: *Honell v. Barnes*, Cro. Car. 382; *Sugden on Powers*, 8th ed., 128; *Re Stephenson*, 24 O. R. 395; R. S. O. c. 110, s. 28.

The Devolution of Estates Act does not appear to contain any provision interfering with an express power of sale, such as is contained in this will. The will gives the executors three years from the testator's death in which to dispose of the land.

The first section of the amending Act, 54 Vict. c. 18 (O.), enacts that real estate not disposed of by the executors or administrators within twelve months after the testator's death, shall go to the devisees or heirs beneficially entitled, unless the executors or administrators have registered a caution as therein provided. But the effect of this enactment, I think, is not to be extended beyond the reversion in the devisee or heir, as the case may be, of the estate which would, but for the 4th section of the Devolution of Estates Act, c. 108, R. S. O., have vested in him upon the testator's death.

The Act in question is intended, as appears on its face, to aid executors and administrators to deal with the estates which are required for the payment of debts where such aid is necessary to enable them to do so; there is nothing in it to interfere with the provisions which testators may themselves have made as to the time and manner in which their estates are to be dealt with. Where

such provisions have been made by a testator, the Act may supplement but does not detract from them, and certainly does not destroy the express directions of a will as to the time and manner of conversion, for the purpose of vesting an absolute title in a beneficiary at an earlier period than the testator intended him to have it. The executor here has a power of sale under the will and can exercise it under the will without regard to the Act. If he had taken it under the Act that would have been a different thing, and he must have exercised it within the time limited by the Act or not at all. See *Re Booth's Trusts*, 16 O. R. 429.

*Followed in re Hewett & Jermyn, 26th April, 1898, 18 C. L. T. 192.*

Where  
will gives  
executor  
power to  
sell lands.

**254.** *Re Booth's Trusts* and *Re Koch & Wideman* were before the Revision of 1897. The original reference of the words "under this Act," in section 16, was to the Act in which they at first stood (Ont. Acts, 1891, c. 18). As they now stand they refer to R. S. O. 1897, c. 127; and they appear to be a general statement of the powers of executors and administrators relating to real estate. If so, the provision that section 16 shall not "derogate from any right possessed by an executor or administrator independently of this Act," would seem to make quite clear by legislation what *re Booth's Trusts* decided, viz., that where a will gives an executor power to sell lands, the consent of the Official Guardian is not required, even if there are infants. The same principle applies if there are adult heirs and no debts, and these adult heirs do not agree to the sale.

Adminis-  
trators and  
executors  
not in all  
respects  
like a trustee  
for sale

**255.** Where administrators in contracting to sell lands under circumstances not requiring the consent of the official guardian, nevertheless made the contract of sale subject to his approval, and, as was alleged, lost the sale by having through negligence and delay failed to obtain such approval within the time required by the contract, but had acted throughout with good faith and to the best of their judgment:—

Held, that they were not liable to make good to the estate the deficiency resulting from a resale.

Under the above act, executors and administrators are not, in all respects, in the same position as a trustee for sale of lands.

Upon the latter is cast a duty to sell, upon the former a mere discretion to be exercised only for certain purposes and in certain events.

Semble, where the approval of the official guardian is not required, notice need not be given to him under Rule 1005.

*In re Fletcher's Estate*, 26 O. R. 499.

**256.** A testator devised to his daughter a lot of land charged with a legacy. The daughter pre-deceased the testator, leaving two children to whom the lot descended. Executors bound to sell land to pay legacy

On an application by the executors at the instance of the Official Guardian, it was:—

Held, that it was the duty of executors to sell the land and pay the legacy.

*Re Eddie*, 22 O. R. 556.

**257.** Land was conveyed in 1874 to a husband and wife who were married in 1864:— Husband as administrator can make title.

Held, that they took like strangers, not by entireties, but as tenants in common:—

Held, also that the husband could by the Devolution of Estates Act, as administrator of the wife, and in his own right, make a valid conveyance of the whole land, although there were no debts of the wife to pay. *Martin v. Magee*, 19 O. R. 705, distinguished.

*Re Wilson and Toronto Incandescent Electric Light Co.*, 20 O. R. 397.

Sale of land—Unknown quantity.

*Sea v. McLean*, 14 S. C. R. 632.

Power of sale.

*Johnson v. Kramer*, 8 O. R. 193.

Power to sell, implied power to take back mortgage.

*Re Graham Contract*, 17 O. R. 576.

Where executors are given express power to sell lands, whether coupled with an interest or not, such power can be exercised by a surviving executor.

*In re Koch*, 25 O. R. 262.

The administrators of an insolvent deceased person contracted to sell some of his lands. Subsequently to the contract a creditor who had obtained a judgment against the deceased in his life time issued execution thereon under an ex parte order therefor against the estate in the hands of the administrators:—

Held, that the execution formed no charge or encumbrance on the lands contracted to be sold.

Orders should not be made ex parte allowing issue of execution against goods of a testator or intestate in the hands of an executor or administrator.

*In re Trusts Corporation of Ontario and Bachmer*, 26 O. R. 191.

An executor or administrator cannot make the lands of the testator or intestate the subject of speculation or exchange by him in the same manner as if the lands were his own.

The Court refused to decree specific performance of a contract by an executor to exchange lands of his testatrix for other lands, as the purpose of the exchange could not have been the payment of debts or the distribution of the estate, and it was shewn that the beneficiaries objected to the exchange, and it did not appear that the official guardian had been consulted.

*Tenute v. Walsh*, 24 O. R. 309.

Under the Devolution of Estates Act, the executor of a deceased lessor can make a valid renewal of a lease pursuant to the covenant of the testator to renew.

*Re Canadian Pacific R. W. Co. and National Club*, 24 O. R. 205.

Rules of  
practice  
where  
guardian's  
consent re-  
quired.

**258.** When the official guardian's consent is necessary to a sale of land as mentioned in the Act, the following rules must be observed.

1. By Rule 971, "Before an executor or administrator takes proceedings under the Devolution of Estates Act for the sale of real estate in which infants are concerned, he shall give to the official guardian or other officer charged with the duties referred to in the 8th section of the said Act notice of the intention to sell, and shall not be entitled to any expenses incurred before giving such notice."

2. Produce the probate or letters of administration to, and leave a copy with, the official guardian.

3. Produce evidence by affidavits of the next of kin and their respective ages.

4. Produce evidence of the value of the land for the purpose of sale. The testimony of independent, experienced and reliable persons is essential.

5. If the land is under mortgage produce a statement from the mortgagee of the amount due on his mortgage, if it can be got; if not, some reliable evidence of the amount due.

If negotiations for sale are pending the official guardian will, upon the above material, assent to the sale if a proper one. If no negotiations are pending he will assent to a sale to be made.

In the meantime it is necessary for the administrators to:—

6. Advertise for creditors in the usual way, and prove the advertisement to the official guardian. Produce the sheriff's certificate as to executions against the deceased. All claims both paid and unpaid, and all known to the executor or administrator, whether sent in or not, must be exhibited to the official guardian.

7. Prove the amount of the personal estate, and show what disposition, if any, has been made of it.

8. The widow must elect between her dower and her share under the Act, and the deed of election must be produced. If the land was under mortgage, show when it was made, and whether it was for purchase money or for a loan, as dower is to be computed according to circumstances.

9. The purchase money must be paid into the Canadian Bank of Commerce, to the joint credit of the executor or administrator and the official guardian.

10. The draft conveyance must be approved by the official guardian, and he will, before delivery, mark his assent on the conveyance.



## Rule 972 is as follows:

Applica-  
tion to  
Judge.

972. The Official Guardian or other official aforesaid, or any person interested in the land or in the proceeds of the sale thereof, may apply in a summary manner to a Judge in Chambers, upon notice to all parties concerned, or to such parties as the Judge may direct, for such direction or order touching the real estate and the proceeds thereof, or the costs of the proceedings, as to the Judge may seem fit. Consolidated Rule 1006.

**259.** In order to make valid certain sales the following sections were passed:

Certain  
past sales  
made with  
approval  
of Official  
Guardian  
confirmed.

17. (1) Sales of such real estate as aforesaid made prior to the 4th day of May, 1891, by executors and administrators with the written consent or approval of the Official Guardian, as required by section 8 of this Act, shall be deemed valid as respects all the heirs and devisees, whether infants or of full age, though there were no debts of the deceased to be paid out of the proceeds.

Certain  
past sales  
may be  
confirmed  
by Official  
Guardian.

(2) The approval of the Official Guardian to be expressed in writing under his hand shall be sufficient to confirm and render valid, as respects all the heirs and devisees, though there were no debts of the deceased to be paid out of the proceeds, any sale made prior to the said 4th day of May, 1891, in any case in which the value of the infants share is under \$50.

Other  
cases of  
past sales.

(3) Sales of such real estate as aforesaid made prior to the said 4th day of May, 1891, by executors and administrators in other cases shall be adjudicated upon according to equity and good conscience, in view of all the circumstances, and every sale which has been made in good faith and for a fair consideration shall be held valid.

Certain  
past sales  
valid un-  
less ques-  
tioned  
within one  
year.

(4) Every sale made prior to the said 4th day of May, 1891, shall be valid unless it was questioned in an action within one year from the said date, except in any case where, under this Act, the approval of the Official Guardian was required and was not obtained.

Where  
past sale  
has been  
subject of  
action.

(5) In case any sale made prior to the 4th day of May, 1891, is now, or heretofore has been, the subject of an action, and relief is given to either party under this section, the party obtaining such relief shall pay the costs of the action. Ont. Acts, 1891, c. 18, s. 3.

18. Where, prior to the 4th day of May, 1891, there had been a sale by executors or administrators, no infant being concerned and no consent or approval of the Official Guardian having been obtained, but the person, or one of the persons, beneficially entitled has received and accepted, or shall hereafter receive and accept, his

share, or supposed share of the purchase money, such acceptance shall be deemed a confirmation of the sale as respects such person. Ont. Acts, 1891, c. 18, s. 4.

**260.** In *re Reddan*, 12 O. R. 781, it was held that the effect of the Devolution of Estates Act was to abolish the distinction between real and personal property for the purposes of administration, and to cast the whole upon the personal representative for distribution as personally. Effect of Dev. of Estates Act.

In *re Malladine*, 10 C. L. T. 226, the right of an administrator to sell realty, except where needed to pay debts, was denied.

In *Martin v. Magee*, 18 A. R. 384, it was decided that a devisee or heir could not make a title without a conveyance from the executor or administrator, whether there were debts or not. This construction of the law had been declared by Ontario Statutes, 1891, c. 18, which enacted that executors and administrators should have power to sell and convey real estate for the purpose not only of paying the debts, but also of distributing the estate among the parties beneficially entitled as directed by the Act. Section 16 above printed (page 80) is a consolidation of the law thus amended.

**261.** In 1891, by the Act 54 Vict. cap. 18, it was enacted that the real estate of a deceased person should shift on to the beneficiaries at the expiration of a year from the death, but power was given to the personal representative to prevent this by registering a caution. If he omitted to caution, however, the land was irretrievably gone from him. In 1893, by the Act 56 Vict. cap. 20, power was given to caution after the land had shifted, and the Act, by section 4, was declared to be applicable to the estates of persons dying "before or after the passing of the said Act or this Act." The Act of 1891 was held not to be retrospective. But the effect of section 4 of the Act of 1893 was apparently to make it retrospective, and to enable the personal representative to Shifting to beneficiaries.

caution after the time in cases to which the original Act had not applied at all. The Chancellor at first held (*Re Baird*, 13 C. L. T. 277), that the effect of section 4 of the Act of 1893 was to make the Act of 1891 retrospective. Thus, though originally not retrospective, it became retrospective after being in force two years. But again, in *re Martin*, 26 O. R. 465, the Chancellor, after further consideration, held that *re Baird* was not correctly decided, and that the effect of the Act of 1893 was not to make the Act of 1891 retrospective. Thus, the estate of a person dying before the 4th of May, 1891, was not subject to shifting or cautioning. And the Act of 1893 was therefore (contrary to its express terms) restricted in its retrospective operation to the estate of persons dying before the Act was passed but after the Act of 1891. The Legislature (Ont. Acts 1897, c. 14, s. 29) amended section 4 of the Act of 1893 by striking out the words "before or," thus making it operative only from the date of the passing of the Act of 1891—namely to 4th May, 1891. Two periods are thus fixed:—one, from the Devolution of Estates Act to 4th May, 1891, and the estates of persons dying during this period are not subjected to shifting or cautioning; the other from 4th of May, 1891, during which the estates of persons dying are liable to shifting and cautioning.

#### Cautions.

**262.** The following sections contain the Revised Statutory rules as to cautions by executors or administrators.

**13. (1)** Real estate of persons dying on or after the 4th day of May, 1891, not disposed of or conveyed by executors or administrators within twelve months after the death of the testator or intestate shall, subject to the Land Titles Act, in the case of land registered under that Act, at the expiration of the said period, whether probate of the will of the testator or letters of administration to the estate of the intestate has been taken or not, be deemed thenceforward to be vested in the devisees or heirs beneficially entitled thereto, as such devisees or heirs (or their assigns, as the case may be), without any conveyance by the executors or administrators, unless such executors or administrators,

Realestate  
not dispos-  
ed of with-  
in a year to  
vest in  
heirs un-  
less cau-  
tion, Rev.  
Stat.c.138.

if any, have caused to be registered, in the registry office, or land titles office where the land is under the Land Titles Act, of the territory in which such real estate is situate, a caution under their hands that it is or may be necessary for them to sell the said real estate, or part thereof, under their powers and in fulfilment of their duties in that behalf; and in case of such caution being so registered, this section shall not apply to the real estate referred to therein for twelve months from the time of such registration, or from the time of the registration of the last of such cautions if more than one are registered. Ont. Acts, 1891, c. 18, s. 1 (1); 1893, c. 20, ss. 3, 4; 1897, c. 3, s. 3; c. 14, s. 29, part.

(2) The caution may be in the form or to the effect following: Form of  
caution,  
Rev. Stat.,  
c. 136.

We (A. B. and C. D.), executors of (or administrators with the will annexed of, or administrators of) \_\_\_\_\_, who died on or about the \_\_\_\_\_ day of \_\_\_\_\_, do hereby certify that it may be necessary for us under our powers and in fulfilment of our duties as executor- (or administrators) to sell the real estate of the said \_\_\_\_\_, or part thereof (or the caution may specify any particular parts or parcels), and of this all persons concerned are hereby required to take notice.

And the execution of the said caution shall be verified by the affidavit of a subscribing witness in manner prescribed by the Registry Act.

(3) In case the caution specifies the tracts or parcels which the If caution  
executors or administrators may have occasion to sell, the caution specifies  
shall be effectual as to these tracts or parcels only. lands,  
these only  
affected.

(4) The executors or administrators before the expiration of the twelve months may file a certificate withdrawing the caution With-  
mentioned in the preceding subsections; or withdrawing the same drawal of  
as to any parcel of land specified in such certificate, and such certi- caution.  
ficate of withdrawal may be to the effect following:

We, \_\_\_\_\_, executors (or administrators) of \_\_\_\_\_ do hereby withdraw the caution heretofore registered with respect to the real estate of the said \_\_\_\_\_ (or as the case may be). Ont. Acts, 1891, c. 18, s. 1 (2-4).

(5) The certificate of withdrawal shall be verified by the aff- Certificate  
davit of a subscribing witness, which shall be in the following of with-  
form, or to the like effect: drawal to  
be verified  
on oath.

I, G. H., etc., make oath and say: I am well acquainted with A. B. and C. D., named in the above certificate; that I was present and did see the said certificate signed by the said A. B. and C. D.; that I am a subscribing witness to the said certificate and I believe the said A. B. and C. D. to be the persons who registered the caution referred to in the said certificate. Ont. Acts, 1897, c. 15, Sched. A (42).

**Renewal of caution.** (6) Before the expiry of a caution another caution may be registered, and so on from time to time as long as the executors or administrators consider such action necessary and every such caution shall continue in force for twelve months from the time of its registration. Ont. Acts, 1897, c. 15, Sched. A (43).

**Certain conveyances not affected.** (7) The limitation of the operation of this section to the real estate of persons dying on or after the 4th day of May, 1891, shall not affect any conveyance made before the 13th day of April, 1897. Ont. Acts, 1897, c. 14, s. 29, part

**Registration of caution for 12 months from death of testator.** 14. Where executors or administrators have, through oversight or otherwise, omitted to register a caution within twelve months after the death of the testator or intestate, as provided by the preceding section, or have omitted to re-register a caution as required by the said section, they may register the caution in either case notwithstanding the lapse of the twelve months respectively provided for the said purposes, provided they register therewith.

**Proviso.**

1. The affidavit of verification therein mentioned.
2. A further affidavit stating that they find or believe that it is or may be necessary for them to sell the real estate of the testator or intestate (or the part thereof mentioned in the caution, as the case may be) under their powers and in fulfilment of their duties in that behalf.
3. The consent in writing of any adult devisees or heirs whose property or interest would be affected; and
4. An affidavit verifying such consent; or
5. In the absence and in lieu of such consent, an order signed by a High Court Judge or County Court Judge, or the certificate of the Official Guardian approving of and authorizing the caution to be registered, which order or certificate the Judge or Official Guardian may make with or without notice, on such evidence as satisfies him of the propriety of permitting the caution to be registered; and the order to be registered shall not require verification, and shall not be rendered null by any defect or supposed defect, of form or otherwise. Ont. Acts, 1893, c. 20, s. 1.

**Effect of registration.**

15. In case of such caution being registered or re-registered under the authority of the preceding section, such caution shall have the same effect as a caution registered within twelve months from the death of the testator or intestate, save as regards persons who in the meantime may have acquired rights for valuable consideration from or through the heirs or devisees, or some of them; and save also and subject to any equities on the part of non-consenting

heirs and devisees, or persons claiming under them, for improvements made after the expiration of twelve months from the death of the testator or intestate, if their lands are afterwards sold by such executors or administrators. Ont. Acts, 1893, c. 20, s. 2.

**263.** The devisee of real estate under the will of a testator, subject to the Devolution of Estates Act and amendments, has a transmissible interest in the lands during the twelve months after the death of the testator, pending which time they are vested by the Act in the legal personal representatives.

Interest of devisees of real estate transmissible.

And where real estate devised by a will so subject, of which letters of administration with the will annexed had been granted during the twelve months succeeding the testator's death, but as to which no caution had ever been registered, was, during such period, mortgaged by the devisee in good faith:—

Held, that the mortgage was operative between the devisee and the mortgagee when made, and became fully so as to the land and against the personal representatives when the year expired, in the absence of any warning that it was needed for their purposes.

*Re McMillan, McMillan v. McMillan*, 24 O. R. 181.

**264.** In order that executors may be placed in a position to deal with the real estate of the testator the following statutory provisions have been enacted: R. S. O. 1897, c. 129, The Trustee Act.

Powers of executors over real estate.

24. Where any person has entered into a contract in writing for the sale and conveyance of real estate, or of any estate or interest therein, and such person has died intestate, or without providing by will for the conveyance of such real estate, or estate or interest therein to the person entitled, or to become entitled to such conveyance under such contract, then if the deceased would be liable to execute a conveyance were he alive, the executor, administrator, or administrator with the will annexed (as the case may be) of such deceased person shall make and give to the person entitled to the same a good and sufficient conveyance, or conveyances, of such estates, and of such nature as the said deceased, if living, would be liable to give, but without covenants, except as against the acts of the grantor:

Executors, etc., may convey in pursuance of a contract for sale made by deceased.

and such conveyances shall be as valid and effectual as if the deceased were alive at the time of the making thereof and had executed the same, but shall not have any further validity. R. S. O. 1897, c. 129, s. 24 (s. 26 R. S. O. 1887, c. 110).

Duties and liabilities of an executor and administrator acting under the powers in this Act.

25. Every executor, administrator, and administrator with the will annexed, shall, as respects the additional powers vested in him by this Act, and any money or assets by him received in consequence of the exercise of such powers, be subject to all the liabilities and compellable to discharge all the duties of whatsoever kind which, as respects the acts to be done by him under such powers, would have been imposed upon an executor or other person appointed by the testator to execute the same, or in case of there being no such executor or person, would have been imposed by law upon any person appointed by law or by any Court or Judge of competent jurisdiction to execute such powers. R. S. O. 1897, c. 129, s. 25 (s. 27, R. S. O. 1887, c. 110).

Powers given by this Act to two or more survivors.

26. Where there are several executors, administrators, or administrators with the will annexed, and one or more of them die, the powers hereby created shall vest in the survivor or survivors. R. S. O. 1897, c. 129, s. 26 (s. 28, R. S. O. 1887, c. 110).

Sales free from claim of dowress

**265.** Where the deceased was married and left him surviving a widow, the following provision enables the personal representative to make a sale of land free from the claim of such dowress (Dev. of Estates Act).

Application for order allowing sale of land by personal representative free of dowress.

11. (1) Where the personal representatives of a deceased person are desirous of selling any land devolving upon them free from dowress, they may apply to a Judge of the High Court, and if the Judge approves he may, by an order to be made by him in a summary way, upon such evidence as to him seems meet, and either ex parte, or upon notice (to be served personally, unless the Judge otherwise directs), determine whether land shall be sold free from the right of the dowress; and in making such determination regard shall be had to the interests of all the parties.

(2) No ex parte order shall be made unless where service upon the dowress cannot be conveniently made.

(3) If a sale free from such dowress is ordered, all the right and interest of such dowress shall pass thereby; and no conveyance or release to the purchaser shall be required from such dowress; and the purchaser, his heirs and assigns, shall hold the premises freed and discharged from all claims by virtue of the rights of any such dowress, whether the same be to any undivided share, or to the whole or any part of the premises sold.

(4) In such case the Court or Judge may direct the payment of such sum in gross out of the purchase money to the person entitled to dower as may be deemed, upon the principles applicable to life annuities, a reasonable satisfaction for such right or interest; or may direct the payment to the person entitled to dower of an annual sum, or of an income or interest to be derived from the purchase money or any part thereof, as may seem just, and for that purpose may make such order for the investment or other disposition of the purchase money or any part thereof as may be necessary. Ont. Acts, 1897, c. 14, s. 30.

**266.** In connection with this subject, the following Land of infants subject to dower, section should be noticed, taken from R. S. O. 1897, c. 168, An Act respecting Infants.

9. If any real estate of an infant is subject to dower, and the person entitled to dower consents in writing to accept in lieu of dower any gross sum which the Court thinks reasonable, or the permanent investment of a reasonable sum in such manner that the interest thereof be made payable to the person entitled to dower during her life, the Court or Judge may direct the payment of such sum in gross, out of the purchase money to the person entitled to dower, as may be deemed upon the principles applicable to life annuities a reasonable satisfaction for such estate; or may direct the payment to the person entitled to dower of an annual sum, or of the income or interest to be derived from the purchase money, or any or any part thereof as may seem just, and for that purpose may make such order for the investment or other disposition of the purchase money, or any part thereof, as may be necessary. R. S. O. 1897, c. 137, s. 9.

**267.** Where the lands of the testator are subject to encumbrance, the following provisions from the Trustee Act (R. S. O. 1897, c. 129) apply: Lands subject to encumbrances.

16. Where, by any will coming into operation after the eighteenth day of September, 1865, or after the passing of this Act, a testator charges his real estate, or any specific portion thereof, with the payment of his debts, or with the payment of any legacy, or other specific sum of money, and devises the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and does not make any express provision for the raising of such debt, legacy or sum of money out of such estate, the said devisee or devisees in trust, notwithstanding any trusts actually declared by the testator, may raise such debt, legacy or money as aforesaid, by a sale and absolute disposition by public auction, or private contract, of the Devisee in trust may raise money by sale or mortgage to satisfy charges, notwithstanding want of express power in the will.



Imp. Act.,  
22-23 V. c.  
35, s. 14.

said real estate, or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other; and any deed or deeds of mortgage so executed, may reserve such rate of interest and fix such period or periods of repayment, as the person or persons executing the same think proper. R. S. O. 1897, c. 129, s. 16 (s. 18, R. S. O. 1887, c. 110).

Power  
given by  
last section  
extended  
to survivors,  
devisees, etc.  
Imp. Act,  
22-23 V. c.  
35, s. 15.

17. The powers conferred by the next preceding section shall extend to all and every the person or persons in whom the estate devised is for the time being vested by survivorship, descent or devise, or to any person or persons appointed under any power in the will or by the High Court, to succeed to the trusteeship vested in such devisee or devisees in trust as aforesaid. R. S. O. 1897, c. 129, s. 17 (s. 19, R. S. O. 1887, c. 110).

Executor  
to have  
power of  
raising  
money  
where  
there is no  
special  
devise.  
Imp. Act,  
22-23 V. c.  
35, s. 16.

18. If a testator, who creates such a charge as is described in section 16, does not devise the real estate charged as aforesaid in such terms as that his whole estate and interest therein become vested in any trustee or trustees, the executor or executors for the time being named in the will (if any) shall have the same or like power of raising the said moneys as is hereinbefore conferred upon the devisee or devisees in trust of the said real estate; and such powers shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship is for the time being vested; but any sale or mortgage under this Act shall operate only on the estate and interest of the testator. R. S. O. 1897, c. 129, s. 18 (s. 20, R. S. O. 1887, c. 110).

Purchas-  
ers, etc.,  
not bound  
to enquire  
as to exer-  
cise of  
powers.

19. Purchasers or mortgagees shall not be bound to inquire whether the powers conferred by the preceding three sections of this Act, or any of them, have been duly and correctly exercised by the person or persons acting in virtue thereof. R. S. O. 1897, c. 129, s. 19 (s. 21, R. S. O. 1887, c. 110).

Imp. Act,  
22-23 V. c.  
35, s. 17.

Section 16  
not to  
affect cer-  
tain sales  
nor to  
extend to  
devisees in  
fee or in  
tail. Imp.  
Act, 22-23  
V. c. 35, s.  
18.

20. The provisions contained in the preceding four sections shall not in any way prejudice or affect any sale or mortgage already made or hereafter to be made under or in pursuance of any will coming into operation before the 18th day of September, 1835; but the validity of any such sale or mortgage shall be ascertained and determined in all respects as if the said sections had not been enacted; and the said several sections shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do. R. S. O. 1897, c. 129, s. 20; s. 22, R. S. O. 1887, c. 110.

Direction  
to sell, etc.,  
may be ex-  
ercised by  
executor

21. Where there is in any will or codicil of any deceased person (whether such will has been made or such person has died before or after the first day of January, 1874), any direction, whether express

or implied, to sell, dispose of, appoint, mortgage, incumber, or lease any real estate, and no person is by the said will or some codicil thereto or otherwise by the testator appointed to execute and carry the same into effect, the executor or executors (if any) named in such will or codicil shall and may execute and carry into effect every such direction to sell, dispose of, appoint, incumber, or lease such real estate, and any estate or interest therein, in as full, large, and ample a manner, and with the same legal effect as if the executor or executors of the testator were appointed by the testator to execute and carry the same into effect. R. S. O. 1897, c. 129, s. 21 (s. 23, R. S. O. 1887, c. 110).

22. Where there is in any will or codicil thereto of any deceased person (whether such will has been made, or such person has died before or after the first day of January, 1874, any power to any executor or executors in such will to sell, dispose of, appoint, mortgage, incumber or lease any real estate, or any estate or interest therein, whether such power is express or arises by implication, and where, from any cause, letters of administration with such will annexed, have been by a Court of competent jurisdiction in Ontario committed to any person, and such person has given the additional security required by section 58 of the Surrogate Courts Act, such person shall and may exercise every such power and sell, dispose of, appoint, mortgage, incumber or lease such real estate, and any estate or interest therein in as full, large and ample a manner, and with the same legal effect for all purposes as the said executor or executors might have done. R. S. O. 1897, c. 129, s. 22 (s. 24, R. S. O. 1887, c. 110).

23. Where there is in any will or codicil thereto of any deceased person (whether such will has been made, or such person has died before or after the first day of January, 1874), any power to sell, dispose of, appoint, mortgage, incumber or lease any real estate, or any estate or interest therein, whether such power is express or arises by implication, and no person is by the said will or some codicil thereto, or otherwise, by the testator appointed to execute such power and letters of administration with such will annexed, have been by a Court of competent jurisdiction in Ontario committed to any person, and such person has given the additional security before mentioned, such person shall and may exercise every such power and sell, dispose of, appoint, mortgage, incumber, or lease such real estate, and any estate or interest therein, in as full, large, and ample a manner, and with the same legal effect, as if such last named person had been appointed by the testator to execute such power. R. S. O. 1897, c. 129, s. 23 (s. 25, R. S. O. 1887, c. 110).

Liability  
of an  
executor  
executing  
convey-  
ances.

**268.** In order that the liability of an executor may be defined when he executes conveyances in his fiduciary capacity, the following provisions have been enacted: R. S. O. 1897, c. 119, An Act respecting the Law and Transfer of Property.

Covenants  
to be  
implied.  
Imp. Act,  
44-45 V. c.  
41, s. 7.

17.—(1) In a conveyance made on or after the first day of July, 1886, there shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases be implied, covenants, to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share of subject matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say:

On coven-  
ants by  
trustees,  
etc. Imp.  
Act, s. 7.

In a conveyance, the following covenant by every person who conveys, and is expressed to convey, as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition or judicial declaration, or under an order of the Court, which covenant shall be deemed to extend to every such person's own acts only, namely:

Against  
encum-  
brances.

That the person so conveying has not executed, or done, or knowingly suffered, or been party or privy to, any deed or thing, whereby, or by means whereof the subject-matter of the conveyance, or any part thereof, is or may be impeached, charged, affected, or incumbered in title, estate or otherwise, or whereby or by means whereof the person who so conveys is in anywise hindered from conveying the subject-matter of the conveyance, or any part thereof, in the manner in which it is expressed to be conveyed.

Convey-  
ances by  
direction  
of benefici-  
ary.

(3) Where in a conveyance, a person conveying is not expressed to convey as beneficial owner, or as settlor, or as trustee, or as mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition or judicial declaration, or under an order of the Court, or by direction of a person as beneficial owner, no covenant on the part of the person conveying shall be by virtue of this section implied in the conveyance. R. S. O. 1897, c. 119, s. 17 (part); (s. 17 R. S. O. 1887, c. 100).

Protection  
of sales of  
land by  
executors.

**269** Sales of land by executors, if made in a reasonable manner, otherwise are protected in certain particulars, by statute, as follows (Trustee Act, R. S. O. 1897, c. 129, s. 29):

29. (1) No sale made by a trustee shall be impeached by any Sales by trustees not impeachable on certain grounds. Imp. Act 51-52 V. c. 59, s. 3.

(2) No sale made by a trustee shall after the execution of the conveyance be impeached as against the purchaser, upon the ground that any of the conditions subject to which the sale was made were unnecessarily depreciatory, unless it appears that such purchaser was acting in collusion with the trustee at the time when the contract for the sale was made.

(3) No purchaser, upon any sale made by a trustee, shall be at liberty to make any objection against the title upon the ground aforesaid.

(4) This section shall apply only to sales made on or after the 4th day of May, 1891. Ont. Acts, 1891, c. 19, s. 8.

2. In the construction of this Act, the words "Will," "Real Estate," and "Personal Estate," shall have the meaning assigned to them respectively by section 9 of the Wills Act of Ontario. R. S. O. 1897, c. 129, s. 2 (s. 1, R. S. O. 1887, c. 110). Interpretation. Rev. Stat., c. 128.

These words are interpreted as follows (R. S. O. 1897, c. 128, s. 9):

1. "Will" shall extend to a testament, and to a codicil, and to an appointment by Will, or by writing in the nature of a Will in exercise of a power and also to a disposition by Will and testament or devise of the custody and tuition of any child, by virtue of the Act passed in the twelfth year of the reign of King Charles II., entitled "An Act for taking away the Court of Wards, and Liveries and Tenures in Capite, and by Knight Service and Purveyance, and for settling a revenue upon His Majesty in lieu thereof," and to any other testamentary disposition;

2. "Real estate" shall extend to messuages, lands, rents and hereditaments, whether freehold or of any other tenure, and whether corporeal, incorporeal or personal, and to any undivided share thereof, and to any estate, right or interest (other than a chattel interest) therein;

3. "Personal estate" shall extend to leasehold estates and other chattels real, and also to moneys, shares of Government and other funds, securities for money (not being real estate), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share and interest therein.

## CHAPTER II.

## LAND AS ASSETS.

Heir liable  
at common  
law for  
debts.

**270.** Besides the liability of the executor or administrator in respect of the personal assets in his hands, the heir of the deceased is liable at the common law to the extent of the real assets descended for the payment of his ancestors' debts of a certain quality, namely, those due on bonds, covenants or other specialties in cases where the deceased bound himself and his heirs.

*Jefferson v. Morton.*

Remedy  
given to  
creditors  
against  
devisee 3  
Wm. and  
M., c. 14.

**271.** Creditors by specialties which affected the heir, provided he had assets by descent, had not at the common law the same remedy against the devisee of their debtor. To obviate this mischief, the Stat. 3 Wm. & Mary, c. 14, was passed. This statute gave the specialty creditor a remedy against the devisee; but did not extend to damages for breach of covenant or contracts under seal made by the testator.

How  
limited.

**272.** It was further held that the statute applied only where a debt in the ordinary sense of the word existed between the parties in the lifetime of both; and, therefore, that an action of debt did not lie against the devisee of a surety in respect of breaches of covenant which did not occur in the lifetime of the testator, even though the damages were liquidated so that in form they might be sued for in an action of debt.

By Stat. 5 Geo. II. c. 7, s. 4, land in colonies liable for debts.

**273.** By Stat. 5 Geo. II. c. 7, s. 4, it is enacted that, The houses, lands, negroes and other hereditaments and real estates situate or being within any of the said plantations, i.e., British plantations in America, belonging to

any person indebted, shall be liable to and chargeable with all just debts, duties and demands of what nature or kind soever, owned by any such person to his Majesty, or any of his subjects, and shall and may be assets for the satisfaction thereof, in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings and process in any court of law or equity in any of the said plantations respectively, for seizing, extending, selling or disposing of any such houses, lands, negroes and other hereditaments and real estate, towards the satisfaction of such debts, duties and demands, and in like manner as personal estates in any of the said plantations respectively, are seized extended, sold or disposed of for the satisfaction of debts."

Lands are assets for the satisfaction of debts in the hands of an executor, under 5 Geo. II., c. 7; and to a plea of plene administravit, the plaintiff may reply lands.

*Gardiner v. Gardiner*, 2 O. S. 520.

Lands may be sold on a judgment against one of several executors, in the same manner as if it had been against all.

*Doe d. Smith v. Shuter*, 5 O. S. 655.

Semble, that lands may be sold under a judgment confessed by an executor.

*Doe d. Lyon v. Lege*, 4 U. C. R. 360.

Under 5 Geo. II., c. 7, lands are assets in the hands of executors for the payment of unliquidated damages in an action of covenant, not merely for debts.

*Sickles v. Asselstine*, 10 U. C. R. 203.

Under 5 Geo. II., c. 7, real estate in the colonies is liable to satisfy a judgment for damages in an action of covenant.

*Nugent v. Campbell, et al.*, 3 U. C. R. 301.

The liability of lands for debts under 5 Geo. II., c. 7, is not affected by the death of the debtor. He or his heir or his devisee after his death may sell or convey to a bona fide purchaser for value, at any time before judgment has been entered against him or his personal representatives, or execution against lands issued upon it; and such purchaser will have a good title as against creditors.

*Lerisconte v. Dorland*, 17 U. C. R. 437.

**274.** Section 35 of R. S. O. 1897, c. 77, The Execution Act, is as follows :

Interest in real estate to be seized and sold under a judgment and execution recovered by a creditor of the testator or intestate against his executor or administrator, in the same manner and under the same process that the same could be sold under a judgment and execution against the deceased if living. R. S. O. 1897, c. 77, s. 35 (R. S. O. 1887, c. 64, s. 26; c. 110, s. 14).

Execution creditors not creditors of deceased. **275.** The land of a testator or intestate is liable to be sold only for his debt, and where it is shewn that the judgment was not in fact recovered in respect of such a debt, but that the execution creditors never were creditors of the deceased, a sale of the land under it cannot be supported.

*Freed v. Orr*, 6 A. R. 690.

Money paid on uncompleted agreement to purchase. Where money has been paid by a testator on an agreement for the purchase of lands, which the vendor has failed to complete, it may be recovered back by the executors, as money had and received to the use of the testator.

*Innes v. Brown*, 5 O. S. 665.

The heirs may show that they are not liable under judgment. **276.** Since 27 Vict. c. 15, for the purpose of an execution against lands, heirs are prima facie bound by a judgment against the executor or administrator of their ancestor, in the same way as next of kin are bound; and although they are not entitled as of course to have the issue tried over again, it is open to them to shew, not only fraud and collusion, but that the judgment or decree, though proper against the executor or administrator, was in respect of a matter for which the heirs were not liable.

*Lorrell v. Gibson*, 19 Chy. 280.

The opinion acted upon by Mowat, V.C., in the last case, that for the purpose of an execution against lands heirs are now prima facie bound by a judgment against the executor, was followed by Strong, V.C., with an intimation that, but for that case, he (V.C. Strong) would not have arrived at the same conclusion.

*Willis v. Willis*, 19 Chy. 573.

**277.** Besides the interest which the executor or administrator in all cases took in the whole personal estate of the testator or intestate, he might in some instances be seized of real property of the deceased as trustee, or be ex officio invested with the power of disposing of it. The rule as stated by Williams (page 573) was, "You must find out the intention of the testator from the whole will taken together, and if it appears on the whole construction that you cannot give effect to the will unless you give to the executors a legal estate, then you must hold that they have the legal estate."

Powers of executor as to real estate apart from Devolution of Estates Act.

**278.** A testator could not alter the legal character of real property by directing, either impliedly or expressly, that it should be considered part of his personal estate; therefore, where lands were devised to executors to be sold for the payment of debts and legacies, the money arising from the sale was considered equitable not legal assets. Important consequences arose from this distinction. Equity, acting on the maxim that things shall be considered as actually done which ought to have been done, considered in some instances, land as money and money as land. Therefore, every person claiming property under an instrument directing this conversion, had to take it in the character which that instrument impressed upon it, and its subsequent devolution and disposition were governed by the rules applicable to that species of property.

**279.** Where real estate is contracted to be sold, the vendor is regarded as a trustee for the purchaser of the estate sold, and the purchaser as a trustee of the purchase money for the vendor; therefore the death of the vendor or vendee before the conveyance or surrender, or even before the time agreed upon for completing the contract, is immaterial.

Real estate contracted to be sold

**280.** On the same principle, money covenanted to be laid out in land and descended to the heir, nor did it make any difference that the covenant was a voluntary one.

Money covenanted to be laid out in and



**281.** Again, a testator can, by his will, change the nature of his real estate to all intents and purposes, so as to preclude all questions between his real and personal representatives after his death.

**282.** Again where the conversion of land into money is directed by a testator for a particular purpose, which fails, so much of the estate as remains undisposed of results to the heir. If, on the other hand, there is a conversion of personal estate into real estate, and there is an ultimate limitation which fails to take effect, the interest which fails results for the benefit of the persons entitled to the personal estate.

**283.** It frequently occurs that the deceased has devised his real estate for the payment of his debts, or of his debts and legacies, or has charged his real estate with their payment.

**284.** With respect to the exoneration of the real estate from legacies, the general rule is equally clear as it is with respect to debts that the personal estate is the first and natural fund for the payment of them, and the real estate is only to be resorted to in aid of the personal. Therefore, even in cases where there is no doubt as to debts and legacies being effectually charged by the testator on the real estate; yet the personal estate remains undischarged from its primary liability to those claims. Accordingly, the direction of the testator to sell or mortgage his real estate for the payment of his debts and legacies, is not alone evidence of the intention of the testator that the personal estate should be exempted from those charges, and amounts only to a declaration that the real estate shall be so applied to the extent in which the personal estate, which by law is the primary fund, shall be insufficient for those purposes.

**285.** Nevertheless, it is clear that a testator may, if he pleases, give the personal estate as against his heir or any other real representative discharged from the payment of his debts and legacies, and in such cases the

rules of exoneration in favour of the heir or devisee fail of application. The personal fund will be exempted if the intention of the testator in its favour can be collected from a sound interpretation put on the whole will. If there appears from the whole testamentary disposition an intention on the part of the testator so expressed as to convince a judicial mind that it was meant not merely to charge the real estate, but so to charge it as to exempt the personal. The rule of construction is such as aims at finding, not that the real estate is charged, but that the personal estate is discharged.

**286.** A pecuniary legacy given generally without specification of a particular fund for its payment is primarily chargeable upon the personal estate, although in other parts of the will the real estate is made expressly liable to it, but if the pecuniary legacy be not given generally but given only out of a particular fund, there the legatee can have recourse only to the particular fund.

Pecuniary  
legacy  
given  
generally.

*Colville v. Middleton*, 3 Beav. 570.

**287.** Where a testator gives a certain portion of his personal estate, and expressly directs that it shall be liable and applicable to the payment of his debts, it is an exoneration of the general personal estate.

Certain  
portion ex-  
pressly  
liable.

*Corentry v. Corentry*, 2 Dr. & Sm. 470.

**288.** Where a testator directs a sale of his real estate, and the proceeds and the personal estate are thrown into one mass, which he subjects to the payment of debts and legacies, the real and the personal estate must contribute in proportion to their relative amounts to the payment of the debts and legacies.

Union of  
funds.

*Allen v. Gott*, L. R. 7 Ch. 439.

**289.** The testatrix, who died in 1891, specifically devised to her grandson a part of her land, which was encumbered. To the plaintiffs she gave a legacy of \$5,000. The remainder of her estate, consisting of personalty and other lands; she did not dispose of or in any way refer

Charge on  
residue.

to in her will, except in the clause:—"I hereby charge my estate with payment of all encumbrances upon the said lands at the time of my death."

Held, that the residue of the estate was charged with the mortgage debts to the exclusion of the land specifically devised.

Such residue was to be treated as one fund and as if it were all personalty, under section 4 of the Devolution of Estates Act, R. S. O. c. 108; and out of it the debts, including the mortgage debts upon the land specifically devised, were first to be paid, and then the legacy; the balance, if any, to go to the heirs-at-law and next of kin.

*Scott v. Supple*, 23 O. R. 393.

Charge by  
implica-  
tion of  
legacy on  
real estate.

**290.** Where there is no specific devise of real estate and a pecuniary legacy is given without any words making it an express charge upon the real estate, and the will contains a subsequent gift of the residue of the realty, there is by implication a charge of the legacy on the real estate.

*Cameron v. Harper*, 21 S. C. R. at p. 278.

Executor's power to sell land not devised, direction to pay debts.

*Yost v. Adams*, 8 O. R. 411.

**291.** A testator by his will directed his executors to pay his debts, funeral expenses and legacies therein-after given out of his estate, and proceeded: "My executors are hereby ordered to sell all my real estate, after the payment of all my just debts and funeral expenses, and all my property and personal effects, money or chattels, are to be equally divided between my children and their heirs, that is, the heirs of my son G. and daughter E., now deceased, and my son J., Mary and Hannah, or their heirs. Should any of my said heirs not be of age at my death, my executors are to place their legacies in some of the banks of Ontario until the said heirs are of age." Held, (1) That there was no intestacy either of the real or personal estate. It is to be presumed

that the testator did not intend to die intestate, and the language showed that he did not intend his heirs to take his property as real estate, as he peremptorily directed a sale, making an actual conversion of it into money, thus blending the real and personal property into a common fund, and then bequeathed it all to the legatees. (2) That the persons entitled to share under the will took per capita and not per stirpes upon the same principle as in the case of *Abrey v. Newman*, 16 Beav. 431. (3) That the grandchild of G. was not entitled to a share, the children of G. taking in their own right and not in a representative capacity.

*Wood v. Armour*, 12 O. R. 146.

**292.** Where there is no absolute direction to sell, but a discretion is given to a trustee to sell or not, there is no conversion; but the property remains of the character it possessed at the death of the testator until the trustee has seen fit in his discretion to change it by an execution of the power.

Discretion  
given to  
transfer no  
conversion

*In re Trusts of Will of Ann Parker*, 20 Chy. 389.

## CHAPTER III.

## PERSONAL PROPERTY DEVOLVING ON EXECUTORS OR ADMINISTRATORS.

Assets defined.

**293.** It now becomes necessary to consider the various kinds of property which may devolve upon an executor or administrator, otherwise called "assets."

**294.** By assets, in the hands of an executor or administrator, is meant sufficient property, from the French *assez*, to make him chargeable to a creditor and a legatee or party in distribution, as far as such property extends.

**295.** The general rule as to what shall be said to be assets in the hands of an executor or administrator to charge him, is thus laid down:

All those goods and chattels, actions and commodities, which were of the deceased in right of action or possession as his own, and so continued to be to the time of his death, and which after his death the executor or administrator doth get into his hands as duly belonging to him in the right of his executorship or administratorship, and all such things as do come to the executor or administrator in lieu or by reason of that, and nothing else, shall be considered to be assets in the hands of the executor or administrator to make him chargeable to a creditor or legatee.

Functions of executor or administrator as to personalty.

**296.** We have seen (paragraph 247) that in Ontario before the Devolution of Estates Act, only personal property went to the executor or administrator. As since that Act all property real and personal devolves upon the personal representative,\* it is necessary to explain the

\* Sub-sec. (4) of section 4 of the Devolution of Estates Act provides as follows:—

Administrator to give security to cover real estate.

(4) Where any person applies to be appointed an administrator, and the administration applied for is a general administration, the application, and the affidavit in support thereof, shall show the particulars of the real estate of the deceased, and the value or probable value thereof; and the amount of the security to be given, shall have reference to such value as well as to the value of the other estate of the deceased. R. S. O., 1887, c. 108, s. 4

functions of a personal representative with respect to all kinds of property. These functions as to personally will be considered, 1. As to Chattels Personal; 2. Chattels Real; 3. Choses in Action. Their duties as to cautioning real property have been stated in the last chapter. Their other duties with regard to real property will also appear.

**297.** Chattels personal are properly and strictly Chattels, personal, defined. speaking things movable, which may be annexed to or attendant on the person of the owner, and carried about with him from one part of the world to another. Such as animals, household stuff, money, jewels, corn, garments and everything that can be properly put in motion and transferred from place to place. All these and other things of the same nature generally speaking belong to the estate of the executor or administrator.

Where a will creates a life estate in chattels, the executor is discharged when he hands over such chattels Life estate in chattels to the tenant for life. The tenant for life, and not the executor then becomes liable for them to the person entitled in remainder.

*Re Munsie*, 10 P. R. 98.

**298.** Chattels animate may be sub-divided into Chattels animate. such as are domestic and such as are *ferae naturae*. In such as are of a nature tame and domestic as horses, kine, sheep, poultry and the like, a man may have an absolute property, and they are therefore capable of being transmitted like any other personal chattel, to his executor or administrator. Also hounds, greyhounds, and spaniels and the like, as they may be valuable, and may serve not only for delight, but profit, shall go to the executors or administrators. In those of a wild nature, i.e., such as are usually found at liberty and wondering at large, generally speaking, a man can have no property transmissible to his representative.

*Black. Comm.* 390, 391.

Qualified  
property  
in animals  
*ferae na-  
turae per  
indus-  
triam.*

**299.** But a qualified property may subsist in animals of the latter class *per industriam hominis*, by a man's reclaiming them and making them tame by art, industry or education, or by so confining them within his own immediate power that they cannot escape and use their natural liberty; and the animals so reclaimed or confined belong to the executor or administrator. Thus if the deceased have any tame pigeons, deer, rabbits, pheasants or partridges, they shall go to his executors or administrators. So, though they were not tame, if they were kept alive in any room, cage or such like place, as fish in a tank; but if at any time they regain their natural liberty, the property instantly ceases unless they have *animum revertendi*, which is only to be known by their usual custom of returning.

2 Black. Comm. 392.

As to Bees. See R. S. O., 1897, c. 117.

*Propter im-  
poten-  
tiam.*

**300.** A qualified property may also subsist in animals *ferae naturae propter impotentiam*; as in young pigeons, who, though not tame, being in the dovehouse, are not liable to fly out, and they go to the executor or administrator.

Animals  
*ratione  
privilegii.*

**301.** The animals which a man has *ratione privilegii* are considered as incident to the freehold and inheritance and did not pass to the executor or administrator. Thus deer in a park, or doves in a dovehouse, did not go to the executor or administrator, but they will go to him now.

Fish.

**302.** So if a man buys fish, as carp, bream, trout, etc., and put them into his pond, and dies, in this case the heir who has the water shall have them, because they were at liberty and could not be gotten without industry; but it is otherwise if they are in a tank or in a net or the like, for then they are severed from the soil. They now devolve upon the executor in both cases.

**303.** But if the deceased has only a term for years in the lands in which the park, warren, dovehouse or pond is situate, the deer, doves and fish will go to the executor as accessory chattels, following the estate of their principal, namely, the park, warren, dovehouse or pond. It must be understood that the executor or administrator can have no further interest than the deceased had in them, i.e., a right to take to his own use as many as he pleases during his term, provided he leaves enough for the stores; for if the lessee for years of a park, or game preserve, kills so many of the deer, fish, game or doves, that there is not sufficient left for the stores, it is waste and will be equally waste in his executor or administrator.

Estate of executor limited by that of deceased.

Old authorities, Wms. p. 619.

**304.** Personal effects of a vegetable nature are the fruit or other parts of a plant or tree, when severed from the body of it, or the whole plant or tree itself when severed from the ground. But unless they have been severed, trees and the fruit and produce of them from their intimate connection with the soil, follow the nature of their principal, and, therefore, when the owner of the land died, they descended to his heir and did not pass to the executor or administrator. Hence pears, apples and other fruits in hanging on the trees at the time of the death of the ancestor, went to his heir and not of the executor or administrator; and so it is of hedges, bushes, etc., for these are all the natural and permanent profit of the earth and are reputed parcel of the ground whereon they grow.

Vegetable chattels.

**305.** Some cases exist where even growing timber trees are, owing to special circumstances, considered as chattels, and such as will pass to the executor or administrator. Thus if a tenant in fee simple grants away the trees they are absolutely passed from the grantor and his heirs and vested in the grantee; and if the latter should die before they are felled, they go to his executor

Growing timber.



or administrator. For in consideration of law they are divided as chattels from the freehold. So where a tenant in fee simple sells the land and reserves the trees from the sale, the trees are in property divided from the land, although in fact they remain annexed to it, and will pass to the executor or administrator of the vendor. But if the person so entitled to the trees distinct from the land, afterwards purchases the inheritance, the trees will be reunited to the freehold in property, as they are de facto.

Old authorities, Williams, p. 620.

Emble-  
ments.

**306.** There are certain vegetable products of the earth which, although they are annexed to and growing upon the land at the time of the occupier's death, yet as between the executor or administrator of the tenant for life, and the remainder man, or reversioner are considered by the law as chattels and will pass as such. They are usually called emblements.

See *Cudney v. Cudney*, 21 Chy. 153.

*Fructus  
industri-  
ales.*

**307.** The vegetable chattels so named are the corn and other growth of the earth, which are produced annually, not spontaneously, and thence are called *fructus industriales*. When the occupier of the land, whether he be the owner of the inheritance of an estate determining with his own life, has sown or planted the soil with the intention of raising a crop of such a nature, and dies before harvest time, the law gives to his executors or administrators the profits of the crop or emblements to compensate for the labour and expense of tilling, manuring and sowing the land. The rule is established as well for the encouragement of husbandry and the public benefit, as on the consideration in the case of a tenant for life, that the estate is determined by act of God.

*Lawton v. Lawton*, 3 Atk. 16; *Cameron v. Gibson*, 17 O. R. 233.

Extent of  
doctrine  
emblem-  
ments.

**308.** The doctrine of emblements extends not only to corn and grain of all kinds, but to everything of an artificial and annual profit that is produced by labour and manuring. Potatoes come under this heading. But the rule does not apply to fruit growing on trees, nor to

the planting of trees. Therefore if a man sow the land with acorns or plant young fruit trees, or oak, elm, ash or other trees, these cannot be comprehended under emblements.

*Graves v. Weld*, 5 B. & A. 105.

**309.** The case of trees, shrubs and other produce of their grounds planted by gardeners and nurserymen with an express view to sale may be mentioned as an exception, for they are removable by them or their executors as emblements are.

Gardeners  
shrubs, etc

*Lee v. Risdon*, 7 Taunt. 191, but see *Wetherell v. Howells*, 1 Campb. 227.

**310.** A growing crop of grass, even if sown from seed, and though ready to be cut for hay, cannot be taken as emblements, because the improvement is not distinguishable from what is natural product, although it may be increased by cultivation.

Growing  
crop of  
grass.

*Evans v. Roberts*, 5 B. & C. 8. 32.

**311.** Where the deceased was seised in fee simple of the land, his personal representatives are entitled to emblements as against the heir, though not as against a doweress. So if the deceased was seised in fee tail, his executor or administrator is entitled to the privilege as against the heir in tail. But where a man is seised of the soil as joint tenant and dies, the corn, etc., sown goes to the survivor, and the moiety shall not go to the executors or administrators of the deceased.

Representative of  
tenant,  
how far  
entitled.

**312.** If a man seised in fee sows the land and then conveys it away and dies before the severance, the crops will not go to the executor of him who has conveyed away the land, but will pass with the soil as appertaining to it.

Representative of  
vender.

**313.** The executor of a tenant in fee did not enjoy the rights to emblements as against a devisee; for if the land itself is devised, the growing crops passed to the devisee and the executor was excluded; and though

As against  
a devise.

the devise was made before sowing, and the devisor afterwards sowed, and died before severance, the devisee formerly had them and not the executor. Now, under the Devolution of Estates Act, they go to the executor.

See *Fisher v. Trueman*, 10 U. C. R. 617 (former law).

Uncertain  
estate.

**314.** The rule is general that everyone who has an uncertain estate or interest, if his estate determines by the act of God before severance of the crop, shall have the emblements, or they shall go to his executor or administrator. Therefore, the administrator or executor of the tenant for life is entitled to emblements to the exclusion of the remainderman or reversioner, because in this case the estate of the tenant is determined by the act of God. So a tenant for years, if he shall live so many years, sows and dies before severance, his executor shall have the corn for the uncertainty of the determination of his estate.

Old authorities, Wms. p. 628.

Tenancy  
at will.

**315.** A tenancy at will is determined by the death of the lessee, and his executor or administrator will be entitled to emblements.

Co. Lit. 55, b.

Right to  
take em-  
blements.

**316.** When there is a right to emblements, the law gives a free entry, egress and regress, as much as is necessary in order to cut and carry them away.

*Hayling v. Okey*, 8 Exch. 531, 545.

Chattels,  
personal  
inanimate,  
pass to  
personal  
represent-  
ative.

**317.** As to chattels personal inanimate, all of these pass to the executor or administrator, and although any one of them should be specifically bequeathed to a legatee, it will not vest in him until the executor has assented.

Three  
cases  
where  
right of  
personal  
represent-  
ative  
barred.

**318.** There are three instances in which the right of the executor or administrator to the chattels personal inanimate of the deceased is barred to some extent in favour of certain special claimants. 1. Heirlooms and things in the nature thereof in respect of the heir or

successor. 2. Fixtures in respect of the heir or devisee, or in respect of the remainderman or reversioner. 3. Paraphernalia and the like in respect of the widow.

**319.** As to heirlooms, there being no special custom in Ontario, the law as it stands in England with regard thereto seems inapplicable in this Province. Fixtures in Ontario, when personal, descends to the personal representative. When real, they devolve upon him under the Devolution of Estates Act. They need not therefore be considered in these pages further than to point out their general characteristics. When personal inanimate chattels are affixed to the freehold they are usually denominated fixtures. Heirlooms  
fixtures.

**320.** In order to constitute such an annexation to a freehold as will bring a chattel within the general rule that whatever is affixed to the realty is thereby made parcel of it, and partakes of all its incidents and properties; it is necessary that the article should be let into it, or united to the land or to substances previously connected therewith. It is not enough that it should be laid upon the land and brought into contact with it. Annexation of  
fixtures.

*Wilde v. Walters*, 16 C. B. 637; *Arglee v. McMath*, 26 O. R. 224.

**321.** If a chattel be affixed to a building merely for the more complete enjoyment and use of it as a chattel, it still remains a chattel, notwithstanding it is annexed to the freehold. Chattel  
affixed to  
building.

See cases cited, Wms. p. 612.

**322.** There may be a sort of constructive annexation of a chattel not actually affixed to the freehold, as if a man has a mill and the miller takes a stone out of the mill to the intent to pick it to grind the better, although it is actually severed from the mill, yet it remains parcel of the mill and will go to the heir. The same law of keys, and in some sort of doors, windows, rings, etc., which, although they are distinct things, go with the inheritance of the house. So the sails of a windmill are Constructive  
annexation  
of chattel  
to freehold

parcel of the freehold. Dung in a heap is a chattel and goes to the executors, but if it lies scattered upon the ground so that it cannot well be gathered without gathering part of the soil with it, then it is parcel of the freehold.

*Longford v. Mahony*, 4 Dr. & Warr. 81, 107.

Chattels  
real.

**323.** Chattels real, which are such as concern or savor of the realty or in other words, issue out of or are annexed to real estate, formerly went to the executor or administrator and not to the heir. It became necessary, therefore, for an executor or administrator to know what interests in land should be comprised under the term of "chattels real." Now under the Devolution of Estates they devolve on the personal representative.

Leases.

**324.** All leases and terms of lands, tenements and hereditaments of a chattel quality are chattels real, and will go to the executor or administrator.

**325.** The general rule for distinguishing these two kinds is that all interests for a shorter period than a life; or, more properly speaking, for a definite space of time measured by years, months or days, are deemed chattel interests; in other words, testamentary, and of the nature for the purposes of succession of other chattels or personal property.

Chattel  
estate in  
lease.

**326.** Thus not only an estate for one's own life, or for the life of another, is deemed a freehold; but if a man grant an estate to a woman during her widowhood, or while she remained unmarried, or while she behaves long as the grantee shall dwell in such a house, or so long as he pays £10, or the like, or until the grantee be promoted to a benefice, or for any like uncertain time; in all these cases the lessee has an estate of freehold in judgment of law, while a lease for 10,000 years is not a freehold but a chattel interest.

Incor-  
poreal  
heredita-  
ments.

**327.** The chattels real which go to the executor or administrator are not confined to terms or leases of lands, but extend to chattel interests in incorporeal here-

ditaments, such as leases for years of markets, profits herself; or to a man and woman during coverture, or so and the like.

Old authorities, Wms. p. 599.

**328.** With respect to the title of an executor or administrator of a mortgagee to the mortgaged property, this formerly depended on the fact whether the mortgagee was in fee or for years; in the former case, the legal estate in the land will descend to the heir. In the latter case it will go like any other term for years to the executor. But with regard to the money due upon the mortgage, it is to be paid to the executor or administrator of the mortgagee by reason of the rule of equity that the satisfaction shall accrue to the fund which sustained the loss.

*Tabor v. Tabor*, 3 Swanst. 636.

**329.** R. S. O. 1897, c. 121, ss. 11 to 14, are as follows:

11. Where a person entitled to any freehold land by way of mortgage has departed this life, and his executor or administrator has become entitled to the money secured by the mortgage, or has assented to a bequest thereof, or has assigned the mortgage debt, such executor or administrator, if the mortgage money was paid to the testator or intestate in his lifetime, or on payment of the principal money and interest due on the mortgage, or on receipt of the consideration money for the assignment, may convey, assign, release, or discharge the mortgage debt and the mortgagee's estate in the land; and such executor or administrator shall have the same power as to any portion of the lands on payment of some part of the mortgage debt, or on any arrangement for exonerating the estate or any part of the mortgage lands, without payment of money; and such conveyance, assignment, release or discharge shall be as effectual as if the same had been made by the person having the mortgagee's estate. R. S. O. 1887, c. 102, s. 12; c. 110, s. 16.

12. Every certificate of payment or discharge of a mortgage, or of the conditions therein, or of the lands or of any part of the same, or of any part of the money, by the mortgagee, or his assignee, his heirs, executors, administrators or assigns, or any one of them, at whatsoever time given, and whether before or after, the time limited by the mortgage for payment or performance, shall, if in conformity with the Registry Act, be valid to all intents and purposes whatsoever. R. S. O. 1887, c. 102, s. 13; s. 17, c. 110.

Effect of  
advance on  
joint  
account.  
Imp. Act,  
44-45 V. c.  
41, s. 61.

13. (1) Where, in a mortgage or an obligation for payment of money, or a transfer of mortgage or of such obligation, the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money belonging to them on a joint account, or where a mortgage or such an obligation, or such a transfer, is made to more persons than one, jointly and not in shares, the mortgage money, or other money or money's worth, for the time being due to those persons on the mortgage or obligation, shall be deemed to be and remain money or money's worth belonging to those persons on a joint account, as between them and the mortgagor or obligor; and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account.

(2) This section applies only if and as far as a contrary intention is not expressed in the mortgage or obligation or transfer, and shall have effect, subject to the terms of the mortgage, or obligation or transfer, and to the provisions therein contained.

(3) This section applies only to a mortgage or obligation, or transfer after the 1st day of July, 1886. R. S. O. 1887, c. 102, s. 14.

Receipts  
of trustees  
mortgagees,  
etc. or  
survivor to  
be effectual  
discharges

14. The bona fide payment of any money to, and the receipt thereof by any person to whom the same is payable upon any express or implied trust, or for any limited purpose, and such payment to and receipt by the survivor or survivors of two or more mortgagees or holders, or the executors or administrators of such survivor, or their or his assigns, shall effectually discharge the person paying the same from seeing to the application, or being answerable for the misapplication thereof, unless the contrary is expressly declared by the instrument creating the security. R. S. O. 1887, c. 102, s. 15.

**330.** Sec. 78 of the Registry Act (R. S. O. 1897, c. 186), is as follows :

Registration  
of discharge  
given by  
person  
other than  
mortgagee

78.—(1) Where the person entitled to receive the mortgage money and to discharge any registered mortgage is not the mortgagee, he shall, at his own expense, cause to be registered, prior to the registration of the certificate of discharge, the instruments or documents through which he claims interest in and title to the mortgage moneys, and until such instruments or documents are registered the registrar shall not register such certificate or discharge. Ont. Acts, 1895, c. 22, s. 4.

(2) Where any probate of will or letters of administration, with the will annexed, is required to be registered under the preceding sub-section, and the will is over seven folios in length, including probate or letters, and the will does not affect lands in the Registry Division, except in so far as the testator was a mortgagee or assignee of a mortgage, it shall not be necessary to register the will at full length; but for the purposes of the said sub-section it shall be sufficient to register so much of the probate or letters of administration, with the will annexed, as to show the grant of probate or such letters, and the appointment of executors or administrators, as the case may be, and by the deposit in the Registry Office of a copy of so much of the probate or letters as show the grant thereof, and the appointment of executors or administrators, with an affidavit verifying such copy, and an affidavit by the executor or administrator, or by one of them, if there is more than one, or by his or their solicitor, to the effect that there is nothing in the will limiting the right of the executor or the administrator to receive the mortgage money and discharge the mortgage, and that the will does not affect lands in the registry division in which the probate or letters is to be registered, except in so far as the testator was the holder of a mortgage or mortgages comprising land in such registry division. Ont. Acts, 1896, c. 29, s. 4.

**331.** A mortgagee may by a manifest declaration of his intent convert the mortgage as well as any other part of his personal estate into land and make it pass accordingly. Mortgagee may convert mortgage.

*Noys v. Mordaunt*, 2 Vern. 581.

**332.** If the mortgagee become entitled to the land in fee simple, as if it descends upon or is devised to him, a question may arise between his heirs and executors whether the charge was to be considered as subsisting for the benefit of his personal representatives, or whether it was merged for the benefit of the person taking the land. The rule in these cases was that if it was indifferent to the party in whom this union of interest arises whether the charge be kept on foot or not, it would be extinguished in equity upon the presumed intention unless an act declaratory of a contrary intention and consequently repelling such presumption was done by him. But if a purpose beneficial to the owner can be Merger of charge.



answered by keeping the charge on foot, as if he were an infant, so that charge would be disposable by him, though the land would not; in these and similar cases equity will consider the charge as subsisting, notwithstanding though it may have been merged at law.

*Ryam v. Sutton*, 19 Beav. 556.

Devise to executor to pay debts.

**333.** At common law, where a man devises land to his executors for payment of his debts, or until his debts are paid, or until a particular sum be raised out of the rents or profits, the executors take only a chattel interest thereby; that is, an estate for so many years as are necessary to raise the sum required, and this interest determines when the rents or profits would have raised the sum, although the executor may have misapplied them.

Effect of Wills Act.

Now by the Wills Act any real estate, where devised to an executor or trustee, shall pass the fee simple, or other the whole estate of the testator, unless a definite term of years or an estate of freehold shall thereby be given to him expressly or by imputation.

R. S. O., 1897, c. 128, s. 35.

Title by condition or remainder.

**334.** An executor or administrator may become entitled to chattels real by condition. As where a lease for years has been granted by the testator upon condition that if the grantee did not pay such a sum of money, or do other acts as the testator appointed, and the condition is not performed after the testator's death, the chattel real came back to the executor. Likewise a chattel real may accrue to the executor or administrator by remainder. Thus a remainder in a term of years, though it never vested in the testator in possession, and though it continue a remainder, shall go to his executor.

Old authorities, Wms. p. 614.

Contingent executory estate.

**335.** Contingent and executory estates and possibilities in chattels real accompanied by an interest are transmissible to the personal representative of a person dying before the contingency upon which they depend takes effect. Thus where a lease for years is bequeathed to

A. for life and after his death to B. for the residue of the term, B. has only an executory interest during the life of A., but this interest is transmissible to B.'s executors or administrators.

*Lampel's Case*, 10 Co. 46.

**336.** Besides personal property of the testator or Chose in action. intestate in possession; that is where he had not only the right to enjoy, but had the actual enjoyment of the thing, property in chattels personal may also be in action, that is where a man has not the occupation but merely the right to occupy the thing in question, the possession whereof may be recovered by a suit or action, from whence the thing so recoverable is called a thing or chose in action.

**337.** With respect to such personal actions as are Personal actions founded on covenants, debts, etc. founded on any obligation, contract, debt, covenant or other duty, the general rule is established that the right of action on which the testator or intestate might have sued in his lifetime survives his death, and is transmitted to his executor, and by 31 Edw. III. s. 1, c. 11, to his administrator. Therefore an executor or administrator shall have actions to recover debts of every description due to the deceased, either debts of record, or debts due on special contracts or under seal, or on simple contracts.

Wms. p. 695.

**338.** The executor or administrator is the only representative of the deceased that the law will regard with respect of his personalties, and no word introduced into a contract or obligation can transfer to another his exclusive rights derived from such representation. Executor or administrator sole representative as to personality.

**339.** The representation of the deceased in matters of contract by his executor or administrator is so complete that generally speaking it is not necessary in order to transmit to the executor or administrator a right of enforcing a contract that he should be named in the terms of it. Executor or administrator need not be named in contract

Actions for injury to personal estate.

**340.** An executor or administrator has the same actions also for injury done to the personal estate of the deceased in his lifetime, whereby it has become less beneficial to the executor or administrator as the deceased himself might have had whatever the form of action might be. Formerly actions founded on wrongs to the freehold did not survive, and, therefore, the executor could not maintain *quare clausum fregit*, nor for other waste in the lifetime of a testator on his freehold. Now by statute, executors may within a year after the death of the testator bring actions for injuries to real estate under the following authority: R. S. O. 1897, c. 129 (The Trustee Act).

To real estate.

As to what actions survive, see Holmsted & Langton (2nd ed.), p. 577.

Actions by executors and administrators for torts.

**10.** The executors or administrators of any deceased person may maintain an action for all torts or injuries to the person, or to the real or personal estate of the deceased, except in cases of libel and slander, in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do; and the damages, when recovered, shall form part of the personal estate of the deceased; but such action shall be brought within one year after his decease. R. S. O. 1897, c. 129, s. 10 (s. 9, R. S. O. 1887, c. 110).

Against executors and administrators for torts.

**11.** In case any deceased person committed a wrong to another, in respect of his person, or of his real or personal property, the person so wronged may maintain an action against the executors or administrators of the person who committed the wrong. The action shall be brought at latest within one year after the decease. This section shall not apply to libel or slander. R. S. O. 1897, c. 129, s. 11 (s. 10, R. S. O. 1887, c. 110).

Damages in actions under two preceding sections.

**12.** In estimating the damages in any action under either of the next preceding two sections, the benefit, gain, profit or advantage, which, in consequence of, or resulting from the wrong committed, may have accrued to the estate of the person who committed the wrong, shall be taken into consideration, and shall form part, or may constitute the whole of the damages to be recovered, and whether or not any property, or the proceeds or value of property belonging to the person bringing the action, or to his estate, has, or have been appropriated by or added to the estate, or moneys of the person who committed the wrong. R. S. O. 1897, c. 129, s. 12 (s. 11, R. S. O. 1887, c. 110).

**341.** An action of injury to the person now survives to the executor of the plaintiff, who can, in case of his death pendente lite, on entering a suggestion of the death and obtaining an order of revivor, continue the action.

Action for personal injury survives.

*Mason v. Town of Peterborough*, 20 A. R. 683.

**342.** R. S. O. 1897, c. 165, also provides for obtaining compensation to families of persons killed by accident, and in duels, thus. —

2. Where the death of a person has been caused by such wrongful act, neglect or default, as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, in such case the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to felony. R. S. O., 1887, c. 135, s. 2.

Action given to recover damage for the death of any person caused by any wrongful act, neglect or default.

3. Every such action shall be for the benefit of the wife, husband, parent and child, of the person whose death has been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased, and in every such action the Judge or jury may give such damages as he or they think proportioned to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action has been brought; and the amount so recovered, after deducting the costs not recovered, from the defendant, shall be divided amongst the before mentioned parties, in such shares as the Judge or jury find and direct. R. S. O., 1887, c. 135, s. 3.

For whose benefit and in whose name such action shall be brought.

8. If, and so often as it shall happen at any time or times hereafter, in any of the cases intended and provided for by this Act, that there shall be no executor or administrator of the person so deceased, or that there being such executor or administrator, no such action as in this Act mentioned, shall, within six months after the death of such deceased person, have been brought by and in the name of his or her executor or administrator, then and in every such case, such action may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been, if it had been brought by and in the name of such executor or administrator; and every action so to be brought shall be for the benefit of the same person or persons, and shall be subject to the same regulations and procedure, as nearly as may be, as if it were brought by and in the name of such executor or administrator. R. S. O. 1887, c. 135, s. 7.

Where no action brought within 6 months by executors of person killed then action may be brought by personal representative instead.

amages.  
Actions on  
covenants  
real.

**343.** Where there are covenants real, that is, which run with the land and descend to the heir, though there may have been a former breach in the ancestor's lifetime, yet, if a substantial damage has taken place since his death, the personal representative is under the Devolution of Estates Act the proper plaintiff.

The former law was settled by *Kingdom v. Nottle*, 1 M. & S. 355.

Annuity.

**344.** An annuity is a yearly payment of a certain sum of money granted to another in fee for life or for years, charging the person of the grantor only. As it concerns no land it is so far considered personal property that although granted to a man and his heirs, or the heirs of his body, it is not a hereditament within the Statute of Mortmain, 7 Edw. I., Statute 2, nor entailable within the statute de donis. In one respect an annuity partakes of the nature of real property, namely, that when granted with words of inheritance it is descendable and formerly went to the heir to the exclusion of the executor. If words of inheritance were employed in the grant it was held that the annuity would pass to the executors. The wording of section 3 of the Devolution of Estates Act is sufficiently wide to include annuities which are personal, in as much as they are included in the term "personal property." A real annuity may perhaps be considered a chattel real. The latter point is not quite so certain, and there may be some doubt as to whether real annuities do descend to the executor. They may still be held to be the property of the heir.

Bank  
stock.

**345.** As to stock in an incorporated bank, the Dominion Banking Act (Dom. Acts, 1896, c. 31) provides as follows:

Executors  
and  
trustees  
not  
personally  
liable.

44. No person holding stock in the bank as executor, administrator, guardian or trustee, of or for any person, named in the books of the bank as being so represented by him, shall be personally subject to any liability as a shareholder; but the estate and funds in his hands shall be liable in like manner and to the same extent as the testator, intestate, ward or person interested in such trust fund would be, if living and competent to hold the stock in his own

name; and if the trust is for a living person, such person shall also <sup>Exception.</sup> himself be liable as a shareholder; but if such testator, intestate, ward or person so represented, is not so named in the books of the bank, the executor, administrator, guardian or trustee shall be personally liable in respect of such stock as if he had held it in his own name as owner thereof.

**346.** Bank stock is personal property. There is no <sup>Shares in joint stock company.</sup> clause in the Dominion Banking Act (Dom. Acts, 1890, c. 31) so providing; but it has been declared that such stock is personal property.\* Shares in joint stock companies are declared to be personal estate by section 27 of the Ontario Companies' Act. (R. S. O. 1897, c. 191.)

**347.** By the death of the master his servant is dis- <sup>Masters and servants.</sup> charged, and therefore neither the executors nor administrators of the former can bring an action to enforce the contract of service after his death. Nor has the executor or administrator, generally speaking, any interest in an apprentice bound to the deceased.

**348.** By section 10 R. S. O. 1897, c. 161 (an Act <sup>Apprentices</sup> respecting Apprentices and Minors), if the master of the apprentice dies, the apprentice, if a male, shall by act of law be transferred to the person, if any, who continues the establishment of the deceased, and such person shall hold the apprentice upon the same terms as the deceased, if living, would have done.

**349.** Under the Acts respecting Patents of Inven- <sup>Copy-rights, patents, trade-marks.</sup> tion and Copyright the expression "legal representatives" includes heirs, executors, administrators and assigns or other legal representatives. In the Act respecting Trade Marks the words "legal representatives" are not interpreted. The exclusive right to an Industrial design is assignable by law, but there is no provision that the personal representative of the proprietor becomes entitled to the proprietor's rights. How far an administrator would be considered as Assignee of an Industrial Design may be doubtful.

Patent of Invention, action against executor for profits.

*Leslie v. Calvin*, 9 O. R. 207.

\* Execution Act, R. S. O. 1897, c. 77, s. 10.

Life insurance policies.

**350.** As to Policies of Life Insurance, the rights and duties of executors and administrators are as follows. (Ont. Insurance Act, R. S. O. c. 203) :

Appointment of trustees

155.—(1) The assured may, by the policy or by his will, or by any writing under his hand, appoint a trustee or trustees of the money payable under the contract of insurance, and may from time to time revoke such appointment in like manner, and appoint a new trustee or new trustees and make provision for the appointment of a new trustee or of new trustees, and for the investment of the moneys payable under the contract. Payment made to such trustee or trustees shall discharge the corporation.

Where no trustees payment of shares of infants.

(2) If no trustee is named in the contract of insurance, or appointed as mentioned in sub-section 1, to receive the shares to which infants are entitled, their shares may be paid to the executors of the last will and testament of the assured or to a guardian of the infants duly appointed by one of the Surrogate Courts of this Province, or by the High Court, or to a trustee appointed by the last named Court, upon the application of the wife, or of the infants or their guardian, and such payment shall be a good discharge to the insurance corporation.

Security by guardians.

(3) A guardian appointed under sub-section 2 shall give security to the satisfaction of the Court or Judge for the faithful performance of his duty as guardian, and for the proper application of the money which he may receive.

Proviso.

(a) Provided that where any insurance money not exceeding \$3,000 is payable to the wife and children of the assured, and some or all of the children are infants, the Court or Judge shall have discretion to appoint the widow of the assured, being the mother of such infants, as their guardian without security.

Surrogate fees in certain cases. Rev. Stat., c. 59.

(4) Where probate of a will or letters of administration or letters of guardianship are sought for the sole purpose of obtaining insurance money, the fees payable thereon shall be as follows:

Where the insurance money does not exceed \$1,000, \$4;

Where the insurance money exceeds \$1,000, but does not exceed \$2,000, \$6;

Where the insurance money exceeds \$2,000, but does not exceed \$3,000, \$8;

And such fees shall be regulated in the manner prescribed by section 76 of the Surrogate Courts Act.

Investment of shares.

(5) Subject to the express terms of the trust instrument (if any), any trustee named as provided for in sub-sections 1, 2 and 3, and any executor or guardian may invest the money received in any security in which trustees, under the law of the Province, may

invest trust funds, and may from time to time alter, vary and transpose the investments; and, where the money is held for infants, may also apply all or part of the annual income arising from the share or presumptive share of each of the infants, in or towards his or her maintenance and education, in such manner as the trustee, executor or guardian thinks fit, and may also advance to and for any of the infants, notwithstanding his or her minority, the whole or any part of the share of the infant of and in the money, for the advancement or preferment in the world, or on the marriage of such infant. Ont. Acts, 1897, c. 36, s. 155.

156.—(1) Where under a contract made or by law deemed to be made in Ontario or a contract issued by an insurance corporation having its head office in Ontario, the insurance money is payable to the representatives of a person who, at his death, was domiciled or resident in a foreign jurisdiction, and no person has become his personal representative in Ontario, the money may, on the expiration of two months after such death, be paid to the personal representative appointed by the Court of the foreign jurisdiction, provided it appears upon the probate or letters of administration, or other like document of such Court, or by a certificate of the Judge, under the seal of the Court, that it has been shown to the satisfaction of the Court that the deceased, at the time of his death, was domiciled or resident at some place within the jurisdiction of such Court.

(2) When the contract of such insurance provides that the insurance money may be paid to the personal representative appointed by the Court of the jurisdiction in which the deceased was resident or domiciled at the time of his death, the money may be paid to such representative accordingly at any time after the death aforesaid, or according to the terms of the policy.

(3) Where under a contract made, or by law deemed to be made in Ontario, the insurance money is payable to the representatives of a person who, at the time of his death, was domiciled or resident in a foreign jurisdiction, and died intestate, the money may after the expiration of three months after such death, if no person has become his personal representative in Ontario, be paid to the person law or persons entitled, according to the law of the foreign jurisdiction, to receive the money, and give a discharge for the same, as if such money were, by the terms of the contract, payable in such foreign jurisdiction.

(4) When a testator domiciled or resident in a foreign jurisdiction disposes of the insurance money by a will valid according to the law of that jurisdiction, then such money may be paid at any time after death, or according to the terms of the contract in that law.



behalf, to the person or persons entitled under such will to receive and give a valid discharge for money payable in such foreign jurisdiction.

Where guardian appointed by foreign court.

(5) Where it appears by any letters of guardianship, or other like document, relating to persons under incapacity issued to be issued by a Court in a foreign jurisdiction, or by a certificate of the Judge, under the seal of such Court, that it has been shown to the satisfaction of such Court that the assured at the maturity of the policy was domiciled or resident within its jurisdiction, and where security to the satisfaction of the Court has been given by the guardian or other like officer appointed by the said letters or document, then the High Court, upon application for the appointment of the said guardian or like officer as trustee under this section, may dispense with the giving of security, provided it has also been shown that the infants or other beneficiaries under incapacity reside within the jurisdiction of the foreign Court, and that the proposed trustee is a fit and proper person, and that the security has, in accordance with the practice of such foreign Court, been given in respect of and for the due application and account of the money payable under the policy.

(6) This section shall apply to policies heretofore issued as well as to policies to be issued hereafter, and whether the death has occurred before the passing of this Act or not. Ont. Acts, 1897, c. 36, s. 156.

Insurance moneys of infants. See *Dodds v. A. O. U. W.*, 28 O. R. 579; *Campbell v. Dunn*, 22 O. R. 98.

Joint tenancy.

**351.** Survivorship holds place between joint tenants of chattel property as well as between joint tenants of inheritance or freehold. Hence an interest which a testator had in a chose in action jointly with another will not pass to his executor. But an exception is made in favour of merchants and traders, and persons engaged in joint undertakings in the nature of trade. The share of the deceased goes to his personal representative.

Joint obligations.

**352.** On the other hand the liability of a deceased person as a joint contractor, obligor or partner, may be enforced against his estate under R. S. O. c. 129 (The Trustee Act), section 15, which provides as follows:

Representatives of deceased joint con-

15. In case any one or more joint contractors, obligors or partners die, the person interested in the contract, obligation, or promise entered into by such joint contractors, obligors, or partners, may

proceed by action against the representatives of the deceased contractor, obligor, or partner, in the same manner as if the contract, obligation or promise had been joint and several, and this notwithstanding there may be another person liable under such contract, obligation, or promise, still living, and an action pending against such person; but the property and effects of stockholders in chartered banks, or the members of other incorporated companies, shall not be liable to a greater extent than they would have been if this section had not been passed. R. S. O. 1897, c. 129, s. 15 (s. 15, R. S. O. 1887, c. 110).

**353.** Under the Judicature Act, R. S. O. 1897, c. 51, section 57 (12), all matters in controversy between parties are to be finally determined. To carry out this intention of the Legislature, the Consolidated Rules of Practice provide (Rule 206) that no action is to be defeated for want of parties, and the Court may deal with the matter in controversy so far as regards the rights and interests of the parties before it.

**354.** All persons claiming relief jointly, severally or in the alternative, may be made plaintiffs (C. R. 185). All persons against whom any relief is claimed jointly, severally or the alternative, may be made defendants (C. R. 186). The defendants need not all be interested in all the relief claimed, or in all the causes of action. (C. R. 187). The defendant may also bring before the Court persons not already parties against whom he seeks any relief related to or connected with the subject matter of the suit (C. R. 209). Thus, all parties may be added that may be necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action.

See Holmsted & Langton (2nd ed.), p. 303.

**355.** The above enactment and rules remove the difficulties formerly met in actions against joint contractors.

Where some but not all of the contractors are sued in an action, they are entitled of right to have all the others within the jurisdiction added as defendants; and the plea of abatement having been abolished the method of exception is by prompt application to the Court under Rule 206 (1-4).

*Gildersleeve v. Balfour*, 15 P. R. 293.

No abatement by reason of death.

**356.** An action does not become abated by reason of the death of parties if the cause of action survives or continues. Whether the cause of action survives or not, there is no abatement by reason of death of parties between the verdict or finding of issues and the judgment, but the judgment may be entered notwithstanding the death. C. R. 394.

Order, adding parties.

**357.** C. R. 396 provides that where by reason of death or change of interest after the commencement of an action, other parties are required, an order adding such parties may be obtained. This rule applies where the cause of action survives or continues to some person not already a party.

See Holmsted & Langton (2nd ed.), p. 576.

Lease of lands held in fee for years reserving rent.

**358.** When a man, seized in fee, makes a gift in tail, or leases for life or for years, reserving rent, the whole rent which becomes due after his death formerly went with the reversion as an incident thereof to his heir and not to his executor. The reason given was that since during the continuance of the particular estate the reversioner loses the profits of the land, the rent of which is to be paid to him as compensation for his losses, and though rent should be expressly reserved to the lessor, his executors and assigns, without naming the heir, the executors could not have it, being strangers to the reversion, which is an inheritance. On the other hand, if a lessee for years made an under lease, reserving rent, the rent accruing after his death went to his executor or administrator, as it still goes, and not to his heir even though the reversion were to him and his heirs during the term, they mentioning the executors.

**359.** Again, if a man seized in fee of one acre of land and possessed of another acre for a term of years, made a lease rendering one entire rent, and died, the reversion of one acre went to his heir and the other to his executors. In this case the rent accruing after was apportioned between the heir and the executors.

**360.** Where no reversion was left in the lessor, and the rent was reserved to his executors, administrators and assigns, it formerly went, and now will go, to them and not to the heir.

No reversion in lessor.

**361.** If the rent be reserved for years, and be severed from the reversion, it formerly went and now goes to the executor or administrator, although the reversion went to the heir. Thus, if a man seised of land in fee made a lease for years reserving rent, and afterwards devised the rent to a stranger, and died, and the stranger was seised of the rent and died, his executors had this rent and not his heirs.

Rent severed from reversion.

**362.** Again, though the whole rent which accrued after the death of the lessor formerly went with the reversion to the heir, yet the arrears of rent which accrued and became payable in the lifetime of the testator or intestate went in all cases to his executor or administrator as part of his personal estate. The executors or administrators of tenant for life of a rent charge, and of tenant *pur autre vie* after the death of *cestui que vie* might bring debt to recover the arrears of such rent at common law, although they could not formerly distrain for rent.

Arrears of rent accrued in lifetime of deceased.

**363.** Before 32 Henry VIII. c. 37, the executors or administrators of a man seised of rent-service or rent-charge, or rent-seek, had no remedy for the arrears incurred in the lifetime of the testator or intestate. By that statute they may either distrain or have an action of debt.

Remedy under 32 H. VIII. c. 37.

**364.** It was formerly important to ascertain the precise period at which rents became payable or other payments, such as annuities or dividends coming due at fixed periods, because an apportionment might be required between the executors representing the personal estate and other persons interested in the estate at large.

Apportionment.

These difficulties have been obviated by the apportionment sections of the Landlord and Tenant Act, R. S. O. 1897, c. 170, which are as follows:

2. Where the words following occur in sections 4, 5, 6, 7 and 8 of this Act, they shall be construed in the manner hereinafter mentioned, unless a contrary intention appears:

1. "Rents" shall include rent-service, rent-charge and rent-seek, and all periodical payments or renderings in lieu of or in nature of rent;

2. "Annuities" shall include salaries and pensions; and

3. "Dividends" shall include (besides dividends strictly so-called) all payments made by the name of dividend, bonus or otherwise out of the revenues of trading or other public companies, divisible between all or any of the members of such respective companies, whether such payments are usually made or declared at any fixed times or otherwise; and all such divisible revenue shall, for the purposes of this Act, be deemed to have accrued by equal daily increment, during and within the period for or in respect of which the payment of the same revenue is declared or expressed to be made; but the said word "dividend" shall not include payments in the nature of a return or reimbursement of capital. R. S. O. 1887, c. 143, s. 1.

Rents, etc. to accrue from day to day and be apportionable in respect of time. Imp. Act, 33-34 V.c.35, s.2. 4. All rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise), shall, like interest on money lent, be considered as accruing from day to day and shall be apportionable in respect of time accordingly. R. S. O. 1887, c. 143, s. 2.

Apportioned part of rent, etc. to be payable when the next entire portion becomes due. Imp. Act, 33-34 V.c.35, s.3. 5. The apportioned part of such rent, annuity, dividend or other payment, shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment, when the entire portion, of which such apportioned part forms part, becomes due and payable, and not before; and in the case of a rent, annuity, or other such payment, determined by re-entry, death, or otherwise, when the next entire portion of the same would have been payable if the same had not so determined and not before. R. S. O. 1887, c. 143, s. 3.

Persons shall have the same remedies for recovering apportioned part as for the entire portion. Imp. Act, 33-34 V.c.35, s.4. 6. (1) All persons and their respective heirs, executors, administrators and assigns, and also the executors, administrators and assigns, respectively, of persons whose interests determine with their own deaths, shall have such or the same remedies for recovering such apportioned parts as aforesaid, when payable (allowing proportionate parts of all just allowances), as they respectively would have had for recovering such entire portions as aforesaid, if entitled thereto respectively.

(2) Provided that persons liable to pay rents reserved out of, or charged on lands or other hereditaments of any tenure, and the same lands or other hereditaments shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically; but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person, who, if the rent had not been apportionable under this Act, or otherwise, would have been entitled to such entire or continuing rent; and such apportioned part shall be recoverable by action from such heir or other person by the executors or other persons entitled under this Act to the same. R. S. O. 1887, c. 143, s. 4.

7. Nothing in the preceding provisions of this Act contained, shall render apportionable any annual sums made payable in policies of assurance of any description. R. S. O. 1887, c. 143, s. 5.

8. The preceding provisions of this Act shall not extend to any case in which it is expressly stipulated that no apportionment shall take place. R. S. O. 1887, c. 143, s. 6.

**365.** Where the choses of action accrue after the decease of the testator or intestate, the rights of the executor or administrator to sue are as follows.

**366.** Upon the death of the testator or intestate, if any injury is afterwards done to his goods and chattels the executor or administrator may bring an action for damages for the tort. He has his option either to sue in his representative capacity, and enter his suit as executor or administrator, or bring the action in his own name and his individual capacity.

**367.** This right of action and option exist in the executor or administrator whether he has ever had actual possession of the property or not; therefore, executors or administrators may maintain trespass for taking away the goods of the testator or intestate after his death, either in their own name or in their representative character, whether they were ever actually in possession of them or not; so an executor or administrator may sue as such as well in his own name upon a contract made with him in his representative character,

Proviso as to rents reserved in certain cases.

Act not to apply to policies of assurance

Imp. Act, 33-34 V. c. 35, s. 6.

Nor where stipulation made to the contrary. 33-34 V. c. 35, s. 7.

Where choses in action accrue after decease, option allowed.

Option exists whether possession had or not.

Executor or administrator may sue where deceased could not.

and this he may do not only in cases where the consideration flows from the deceased, but also in cases where the consideration flows directly from himself as executor.

Old cases, Wms. p. 762.

**368.** In many cases an action on which a testator himself could not have sued may accrue to the executor or administrator upon a contract made with the testator or intestate in his lifetime. Thus, if A. covenants with B. to make him a lease of certain land by such a day, and B. dies before the day and before any lease made, if A. refuse to grant the lease when the day arrives to the executor of B., the executor shall have an action on the covenant. So, if a contract be made to deliver a horse on a given day to B. or his assigns, if B. die before the day limited for the delivery of the horse, his executor may maintain an action on the contract if A. refuse to deliver the horse to him, because by law he is the assignee of B. for such a purpose, and represents his person as to receiving any chattels real or personal.

Old cases, Wms. p. 768.

Right in  
remainder.

**369.** Likewise a right to sue which never existed in the testator or intestate may accrue to the executor or administrator by remainder, as where a lease is made to B. for life, the remainder to his executors for years, or where a lease for years is bequeathed by will to A. for life and afterwards to B., who dies before A.

Wms. p. 769.

Pledges,  
rights over

**370.** If no time be set for redemption of a pledge, it has been laid down that the pledgor must redeem during his life, because his executors cannot redeem. The pledgor is not confined to the lifetime of the pledgee. The tender should be to the executor of the pledgee.

*Kemp v. Westbrook*, 1 Ves. Sen. 278.

Contingent and  
executory  
interests.

**371.** Contingent and executory interests, whether in real or personal estate, are transmissible to the representative of a party dying before the contingency

upon which they depend takes effect. Where the contingency upon which the interest depends is the endurance of the life of the party entitled to it till a particular period, the interest itself will be extinguished by the death of the party before the period arrives, and will not be transmissible to the administrators.

Wms. p. 773.

**372.** An instance occurs of a claim founded on <sup>Pin-money</sup> contract which might have been enforced by the deceased while alive, and yet is not transmitted to the executor or administrator in the case of arrears of pin money, to which the wife herself may be to some extent entitled, but which cannot be recovered to any extent whatever by her personal representatives. As between husband and wife the former rules are entirely altered by the statute relating to the property of married women. In that statute the husband and wife are virtually divorced and their estates are considered with reference to each other as if they were strangers.

**373.** As between executor and widow, those gifts of money by a husband to a wife for clothes, or to purchase ornaments, or for her separate expenditure, which are usually called pin money, are good in equity as against the husband and all volunteer claimants through him.

**374.** As to the rights of married women the law <sup>Rights of</sup> now is as follows, according to the Married Women's <sup>married</sup> Property Act, R. S. O. 1897, c. 163.

2. In this Act the word "contract" shall include the acceptance <sup>Interpre-</sup> of any trust, or of the office of executrix or administratrix, and the <sup>tation.</sup> provisions of this Act, as to liabilities of married women, shall extend to all liabilities by reason of any breach of trust or de- <sup>"Con-</sup> vastavit committed by a married woman being a trustee or execu- <sup>tract."</sup> trix or administratrix, either before or after her marriage, and her husband shall not be subject to such liabilities, unless he has <sup>Liability</sup> acted or intermeddled in the trust or administration, and the word "property" shall include a thing in action. R. S. O., 1887, c. 132, <sup>"prop-</sup> <sup>erty."</sup> s. 2.



Married women to be capable of holding real or personal property *feme-sole*. 3. (1) A married woman shall be capable of acquiring, holding as her separate property, and disposing by will or otherwise of any real or personal property, in the same manner as if she were a *feme-sole* without the intervention of any trustee.

Power to contract. (2) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, in all respects as if she were a *feme-sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise. R. S. O., 1887, c. 132, s. 3 (1, 2).

Earnings of married women. 6. (1) Every married woman, whether married before or after the passing of this Act shall be entitled to have and hold as her separate property, and to dispose of as her separate property, the wages, earnings, money and property gained or acquired by her in any employment, trade or occupation in which she is engaged, or which she carries on, and in which her husband has no proprietary interest, or gained or acquired by the exercise of any literary, artistic or scientific skill.

Property of a woman married on or after 1st July, 1884. (2) Every woman married on or after the first day of July, 1884, shall also be entitled to have and hold and to dispose of as her separate property, all other real and personal property belonging to her at the time of marriage, or acquired by or devolving upon her after marriage. R. S. O., 1887, c. 132, s. 5.

As to stock, etc. to which a married woman is entitled. 10. All deposits, all sums forming part of public stocks or funds, which, on the first day of July, 1884, were standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of, or in any corporation, company or public body, municipal, commercial or otherwise, or of, or in any industrial, provident, friendly, benefit, building or loan society, which, on the first day of July, 1884, were standing in her name shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman; and the fact that any such deposit, sum forming part of public stocks, funds, or of any share, stock, debenture, debenture stock, or other interest as aforesaid, is standing in the sole name of a married woman, shall be sufficient *prima facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorize and empower her to receive or transfer the same, and to receive the dividends, interests and profits thereof, without the concurrence of her husband

and to indemnify all public officers and all directors, managers and trustees of every such corporation, company, public body or society as aforesaid, in respect thereof. R. S. O., 1887, c. 132, s. 9.

20. A married woman who is an executrix or administratrix, <sup>Married</sup> alone or jointly with any other person or persons of the estate of <sup>woman as</sup> any deceased person, or a trustee alone or jointly as aforesaid, of <sup>executrix</sup> property subject to any trust, may sue or be sued, and may transfer or join in transferring, in that character, any such particulars as are mentioned in section 10, without her husband, as if she were a <sup>or trustee,</sup> feme sole. R. S. O., 1887, c. 132, s. 19.

23. For the purposes of this Act, the legal personal represent- <sup>Legal</sup> tative of any married woman shall, in respect of her separate estate, <sup>represent-</sup> have the same rights and liabilities, and be subject to the same <sup>ative of</sup> jurisdiction as she would have, or be, if she were living. <sup>married</sup> R. S. O., <sup>woman,</sup> 1887, c. 132, s. 22.

**375.** The term paraphernalia\* is used to signify the <sup>Parapher-</sup> apparel and ornaments of a wife suitable to her rank <sup>nalio,</sup> and degree. What are to be so considered are questions to be decided by the Court and will depend upon the rank and fortune of the parties.

**376.** There is one other species of interest in the <sup>Donatio</sup> property of the deceased which vests neither in the <sup>mortis</sup> personal representative, nor in his heir, nor in his widow. <sup>causa,</sup> This is called a donatio mortis causa. To constitute such a gift there must be two attributes. 1. The gift must be with a view to the donor's death. 2. It must be conditioned to take effect only on the death of the donor by his existing disorder. 3. There must be a delivery of the subject of the donation. The deceased should at the time of the delivery not only part with the possession, but also with the dominion over the subject of the gift.

*Hawkins v. Blewitt*, 2 Esp. N. P. C. 663.

**377.** A donatio mortis causa differs from a legacy <sup>How it</sup> in these particulars: 1. It need not be proved in the <sup>differs</sup> Surrogate Court. 2. No assent or other act on the part <sup>from a</sup> of the executor or administrator is necessary to perfect <sup>legacy.</sup> the title of the donee.

*Tate v. Hibbert*, 2 Ves. 120.

\* Greek, para-pherne; over and above dower.

How it  
differs  
from a gift  
*inter vivos*.

**378.** A *donatio mortis causa* differs from a gift *inter vivos* in these respects, in which it resembles a legacy: 1. It is ambulatory, incomplete and revocable during the testator's life. 2. It is liable to the Succession Duties Act (R. S. O. 1897, c. 24). 3. It is liable to the debts of the testator upon deficiency of assets.

*Ward v. Turner*, 2 Ves. Sen. 434.

*Donatio mortis causa.*

*Hall v. Hall*, 20 O. R. 168, 684; *Freeman v. Freeman*, 19 O. R. 141.

*Gift inter vivos.*

*Re Murray, Pardham v. Murray*, 9 A. R. 369; *Watkins v. Bradshaw*, 6 A. R. 666.

Property  
regarded  
as assets  
though  
never in  
testator.

**379.** There are many instances in which property in the hands of an executor is regarded as assets, although it was never in the testator. Thus, if an executor renew a lease he shall account for the new lease as well as the old as assets. So if A. covenants with B. to make him a lease of certain lands by such a day, and B. dies before the day, and before any lease is made, A. is bound to make the lease to the executor of B., and the lease so made shall be assets in his hands; or, if A. refuses to grant the lease, he is liable to make the executor a compensation in damages, which are also assets. So if A. promises, on good consideration, to deliver to B. by such a day certain wares or merchandise, and this is not performed in the life of B., but delivery is made to his executor, the goods will be assets in his hands, as well as the money recovered in damages for not performing would have been.

Chattels  
which  
never vest-  
ed in tes-  
tator.

**380.** Again, chattels which never were vested in the testator in possession, but accrue to the executor by remainder will be assets in his hands. Thus if a lease be made to one for life, remainder to his executor for years, such remainder will be assets in the hands of the executor, though it were never in the testator. So where a lease for years is bequeathed to A. for life, and afterwards to B., who dies before A.; although B. never had

this term in him, it shall be assets in the hands of his executor. So a remainder in a term for years, though it never vested in the testator's possession, and though it still continued a remainder, shall be assets in the hands of the executor. For it bears a present value and is vendible. So goods which have accrued by increase since the testator's death are assets in the hands of the executor. Accretions

**381.** Thus if the sheep, or other cattle of the testator, bear lambs, etc., after the testator's death, these, although never the property of the testator will be assets. So if the executor of a lessee for years enter into the tenements, the profits over and above the rent shall be assets. Therefore, if an executor has a lease for years of land of the value of £20 a year, rendering rent of £10 a year, it is assets in his hands only for £10 over and above the rent. Profits on employment of testators' goods in trade.

*Vincent v. Sharpe*, 2 Stark, 507.

**382.** Again, if an executor employ the testator's goods in trade, the profits shall be assets, and whether the executor takes upon himself to carry on the testator's trade, or does so in pursuance of a provision in articles of partnership entered into by the deceased, or by the direction of the testator, contained in his will, or under the direction of the Court of Chancery, the profits of such trade shall be assets for which he shall be accountable. Chattels coming to executor by condition.

The liability of an executor who carries on a business is more fully stated in the chapter relating to the liability of an executor for his own acts.

**383.** So chattels, real or personal, to which the executor becomes entitled after the death of the testator by force of a condition will be assets, as where a lease for years, or cattle, plate or other chattel was granted by the testator upon condition that if the grantee did not pay Chattels mortgaged or pledged.

such a sum of money, or do other acts, etc.; and this condition is broken, or not performed after the testator's death, the chattel will be brought back to the executor and be assets.

Redemption by executor.

**384.** The law is the same where the condition is that the testator shall pay money or do any other act to avoid the grant; accordingly chattels, whether real or personal, mortgaged or pledged by the testator, and redeemed by the executor, shall be assets in the hands of the executor for so much as they are worth beyond the sum paid on their redemption.

*Glaholm v. Rountree*, 6 Ad. & Ell. 710.

**385.** Redemption by an executor before or after the time specified for redemption is elapsed has the same effect, the excess in the value of the thing beyond the money paid for redemption is regarded as assets.

Rights of foreign administrator.

**386.** Although, where different administrations are granted in different countries, that administration is deemed the principal or primary one which is granted in the country or domicile of the deceased; yet each portion of the estate must be administered in the country in which possession of it is taken and held under lawful authority. The administrator under a foreign grant has a right to hold the assets received under it against the home administrator, even after they have been remitted to the country in which the home administration was granted. The only mode of reaching such assets is to require their transmission or distribution after all the claims against the foreign administration have been duly ascertained or settled.

Ancillary probate or administration.

**387.** An ancillary probate or grant of administration in a foreign country is usually admitted by the comity of nations as a matter of course. This new administration, however, is made subservient to the rights of creditors and other claimants resident within the country where it is granted. The residuum is transmissible to

the country of the original administrator only when the final account has been settled in the proper tribunal where the new administration is granted, upon the equitable principles adopted by its own law in the application and distribution of the assets found within its jurisdiction.

Ancillary Probate has already been explained ante paragraphs 153-166.

As to rights of foreign creditors in Ontario, see *Milne v. Moore*, 24 O. R. 456. As to rights of foreign administrators dealing in Canada with foreign assets, see *Grant v. Macdonald*, 8 Chy. 469.

**388.** A will executed by a person when domiciled in the Province of Quebec before two notaries there, in accordance with the law of that Province, not acted upon or proved in any way before any Court there, is not within the Act respecting Ancillary Probates and Letters of Administration. Quebec will.

*In re MacLaren*, 22 App. R. 18

**389.** The general rule is that an executor or administrator shall not be charged with any other goods as assets than those which come to his hands. Considerable difficulty consists in ascertaining what is to be esteemed such a coming to the hands of the executor or administrator. Assets "coming to hands of executor."

**390.** It is said in Wentworth's "Office of an Executor," that if the testator, at the time of his death, had a stock of sheep in Cumberland, bullocks in Wales, fat oxen in Bucks, money, household stuff and plate in London, and his executor dwells at Coventry, namely, far from all these places, the executor has such an actual possession presently upon the testator's death that he may maintain trespass against any stranger taking them away, or spoiling them, and, therefore, that author considers it doubtful whether this shall not be such a possession in the executor, and such a giving of these goods to his hands, as to charge him with payment of debts and legacies, and make his own goods liable instead of them. Right of action against convertor.

**391.** However, it was laid down by Lord Holt that if an executor live at London, and the goods of which the testator died possessed are at Bristol, although the executor has such an immediate possession of them that he may maintain trover in his own name against any convertor of them, and the damages recovered shall be assets in his hand; yet if he do not recover so much in damages as really the goods were worth, and that happens not through any fault of his he shall answer for no more than he recovers.

Goods  
taken  
wrongfully  
from  
executor.

**392.** Again, if goods come fully into the possession and hands of an executor or administrator, but are afterwards taken wrongfully from him, a question arises whether such goods shall be considered assets in his hands. As to these, an executor or administrator stands in the condition of a gratuitous bailee; with respect to whom the law is that he is not to be charged without some default in him. Therefore if any goods of the testator are stolen from the possession of the executor, or from the possession of a third person, to whose custody they have been delivered by the executor, the latter shall not be charged with these as assets.

Goods  
taken by  
trespasser.

**393.** Again, if a trespasser takes goods out of the possession of an executor or administrator, although he is bound to sue the trespasser, if known, yet the executor or administrator shall not be answerable in assets for more than he recovers in the suit. But if he omits to sell the goods at a good price, and afterwards they are taken from him, then the value of the goods shall be assets in his hands, and not what he recovers, for there was a default in him. Again, if the goods be perishable goods, and before any default in the executor to preserve them or sell them at due value, they are impaired, he shall not answer for the first value, but shall give that matter in evidence to discharge himself; so if the testator's sheep or other beasts die, or if his ships perish by tempest, the executor shall not be charged with them as assets.

Perishable  
goods.

**394.** With respect to choses in action, although debts of every description due to the testator are assets, yet the executor or administrator is not to be charged with them till he has received the money. So if the executor or administrator recovers any damages or compensation for any injury done to the personal estate of the testator before or since his decease, or for the breach of any covenant or contract made with the testator, or with himself in his representative character all such damages thus recovered shall be assets in his hands, the costs and charges of recovering them being deducted; but he shall not be charged with them until he has reduced them into possession; but such debts or damages will be regarded as assets, although never in point of fact received, if they be released by the executor for the release in contemplation of law shall amount to a receipt. So if the executor takes an obligation in his own name for a debt due to the testator; he shall be equally chargeable as if he had received the money; for the new security has extinguished the old right and is quasi payment.

Choses in action, liability of executor for.

Executor taking obligation in his own name.

*Sparkes v. Restal*, 22 Beav. 587.

**395.** Where an executor sues for money had and received to his use as executor the debt or damages is assets immediately. For if the money was had and received by the defendant by the consent or appointment of the executor, it was assets in his hands forthwith, and if without his consent, yet the bringing of the action is such a consent that upon judgment obtained it shall be assets immediately without execution.

Executor suing for money had and received.

*Jenkins v. Plume*, 1 Salk. 207.

**396.** There may be personal property of the testator or intestate to which his personal representative as such is entitled, which is not assets in his hands by reason of not being vendible.

Assets not vendible.

Wms., p. 1537.

K.E.A.—10



Estates  
*pur autre  
vie.*

**397.** Estates *pur autre vie* are classed under this heading. In Ontario they are devisable by virtue of the Wills Act (R. S. O. 1897, c. 128, s. 10), which enacts as follows, "and the power hereby given [that of disposing by will] shall extend to estates *pur autre vie* whether there be or be not any special occupant thereof, and whether the same be corporeal or incorporeal hereditaments."

Dev. of  
estates *pur  
autre vie.*

**398.** The devolution of estates *pur autre vie* is provided for by section 38 of the Devolution of Estates Act, which says that such estates shall descend as estates in fee simple. But under section 37, section 38 does not apply to the estates of persons dying on or after 1st July, 1886. As to such estates therefore after that date there is apparently no existing statutory rule. If it was intended to continue the former law, then that law was as follows:

Special  
occupancy.

The Statute of Frauds (29 Car. II. c. 3, s. 12), after permitting a devise of such estates to be made, enacts that if no devise is made of such estate the same is chargeable in the hands of the heir, if it shall come to him by special occupancy as assets by descent. In case there shall be no special occupant it shall go to the executors or administrators of the grantee, and shall be assets in their hands for payment of debts.

Surplus of  
such  
estates.  
14 Geo. II.,  
c. 20, s. 9.

**399.** As the Statute of Frauds did not provide to whom the surplus of such estates, after the debts of the deceased owners thereof were satisfied should belong, 14 Geo. II., c. 20, s. 9, enacts that the said surplus shall be distributed in the same manner as the personal estate of the testator or intestate.

Tenant  
*vic* dying  
*pur autre  
intestate.*

**400.** Both statutes omitted to provide for the case of a tenant *pur autre vie* dying intestate as to that estate, but having made a valid will of his personalty. In other words, these statutes omitted to state whether the surplus in such case should go according to the personal

estate disposed of by the will, or as undisposed of personal estate. Nor was any provision made for the surplus which might be in the hands of an executor or administrator as special occupant. It was eventually settled that the executor held it as trustee for the residuary legatee.

*Ripley v. Waterworth*, 7 Ves. 425.

**401.** Section 3 of the Devolution of Estates Act includes under the head of estates subject to the Act, estates "limited to the heir as special occupant." These estates must be under a will or grant to a man and his heirs during the life of cestui que vie. The heirs who are now to take such an estate will be found as if the estate were personal estate.

**402.** But the effect of section 37 upon section 38 as to such estates after 1st July, 1886, may be to revive the estate of general occupancy which was reduced almost to nothing by 29 Car. II. c. 3 and 14 Geo. II. c. 20. This difficulty should be removed by legislation.

**403.** The absolute property must have been vested in the testator in order to make them assets in the hands of the executor. Therefore if the testator takes a bond for another in trust, and dies, this is not assets in the hands of his executor. So if the obligee assigns over a bond and covenants not to revoke, and dies, that bond is not assets in the hands of the executor of the obligee.

*Deering v. Torrington*, 1 Salk. 79.

**404.** When a term for years is created for a particular purpose, as for receiving money for payment of debts or portions for younger children, and the purpose for which the term was created is satisfied, the termor is considered in equity as a trustee for the owner of the inheritance, although at law the term was deemed a term in gross in such trustee; in equity it follows the fee and is looked upon as completely consolidated with it; it was, therefore, not regarded as personal assets in

the hands of the executor and the person entitled to the fee, but as real assets which go to the heir.

*Thrufton v. Att.-Gen.*, 1 Vern. 341.

Property held by testator for particular purpose.

**405.** Executors and administrators cannot be in better condition with respect to the estate of the deceased than he himself would have been in, and therefore, they cannot employ as general assets property which he would have been bound to apply to a particular purpose; thus a remittance in bills and notes for a specific purpose, namely, to answer acceptance, was received by an administrator in consequence of the death of the party to whom the remittance was made. It was held that the special purpose operated as a lien, and that the sum remitted could not be applied by the administrator as general assets.

Deed set aside as fraudulent.

**406.** Where a deed is set aside as fraudulent against any of the creditors of the deceased, the property becomes assets, and subsequent creditors are let in. An assignment within the statute 13 Eliz. c. 5, is utterly void against creditors, and the property assigned is assets in the hands of the executor.

*Shears v. Rogers*, 3 B. & Adol. 362.

Equitable assets defined.

**407.** There are various interests frequently forming part of the estate of an executor or administrator which are not recognized as assets at law, and which, therefore, if administered at all, had to be administered in equity. This latter portion of the estate in the hands of the executor or the administrator, was called equitable assets, in contra distinction to the former, which were called legal assets. An important distinction existed with respect to the administration of these two kinds of assets.

Difference between legal and equitable assets defined.

**408.** If they were legal, they had to be administered by the executor or administrator of the deceased in a course of administration having regard to those rules of priority among creditors formerly in existence. But if

the assets in the hands of the executors were equitable, then, although the precedence in payment of debts to legacies had to be respected, yet, as among creditors, the assets had to be applied in satisfaction of all the claimants *pari passu*, without any regard to the priority in rank of one debt to another; the principle of this distinction was that in natural justice and conscience, and in the contemplation of a Court of Equity, all debts being equal, the debtor was equally bound to satisfy them all, whether by speciality or by simple contract. Therefore, since a claimant upon equitable assets was under the necessity of going to a Court of Equity in order to reach them, that Court would act only according to the rule of doing justice to all creditors, without any distinction as to priority.

*Shattock v. Shattock*, L. R. 2 Eq. 182, 194.

The distinction between legal and equitable assets is, however, still of some importance, that is to say, in the following respects, namely :—(1) In determining whether an executor or administrator is entitled to retain his own debt (whether contract or specialty) out of the assets; and (2) In determining *semble* the extent of the execution available for the creditor (plaintiff in an action); for when the court of law is sitting as such, that is to say, when the creditor's action is a purely legal action the execution would still be against the legal assets only; while if the action was properly framed as an equitable action, the execution or equitable relief would extend to the equitable assets as well as the legal assets.

Snell's Principles of Equity (Ed. 1894, p. 252), The statement as to retainer is inapplicable to Ontario.

## CHAPTER IV.

## POWER AND AUTHORITY.

Power of  
adminis-  
trator; of  
executor.

**409.** After administration is granted the power of an administrator is equal to and with the power of an executor. An executor *de son tort* cannot bring any action in right of the deceased, except that if in possession of goods of the deceased, he can maintain an action against a wrongdoer in respect of such goods.

*Elliott v. Kemp*, 7 M. & W. 306.

Right of  
entry and  
possession  
of goods.

**410.** Within a convenient time after the testator's death or the grant of administration, the executor or administrator has a right to enter the house descended to the heir in order to remove the goods of the deceased, provided he do so without violence. He also has the right to take deeds and other writings relative to the estate out of a chest in the house if it be unlocked or the key be in it, but he has no right to break open even a chest. If he cannot take possession of the effects without force he must desist and resort to his action. On the other hand, if the executor or administrator on his part be remiss in removing the goods within a reasonable time, the heir might formerly, but not now, distrain them as damage feasant.

*Stodden v. Harrey*, Cro. Jac. 204.

Right to  
distrain.

**411.** Where a lessee for years underlets the land and dies, his personal representative may distrain at common law for the arrears of rent which became due in the lifetime of the deceased. Because these arrears were never severed from the reversion; but the executor or administrator has the reversion and the rent annexed thereto in the same plight as the deceased himself had it, and it is not like a reversion which descended to the heir, while the arrears went to the executor or administrator.

*Wade v. Marsh*, 1 Roll. Abr. 672.

**112.** But at common law the executors or administrators of a man seized of a rent service, rent charge, or in fee, or for his own life, or *pur autre vie*, could not distrain for the arrears incurred in the lifetime of the testator or intestate. By 32 Hen. VIII. cap. 37, it was enacted that executors may have action and distrain for rent due their testator in his lifetime. R. S. O. 1897, c. 129, The Trustee Act contains the following provisions:

13. The executors or administrators of any lessor, or landlord, may distrain upon the lands demised for any term or at will for the arrears of rent due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done if living. R. S. O. 1897, c. 129, s. 13 (s. 12, R. S. O. 1887, c. 110).

14. Such arrears may be distrained for at any time within six months after the determination of the term or lease, and during the continuance of the possession of the tenant from whom the arrears became due; and the powers and provisions contained in the several statutes relating to distresses for rent, shall be applicable to the distresses so made as aforesaid. R. S. O. 1897, c. 129, s. 14 (s. 13, R. S. O. 1887, c. 110).

**113.** It is a general rule of law and equity that an executor or administrator has an absolute power of disposal over the whole personal effects of his testator or intestate, and they cannot be followed by creditors, much less by legatees, either general or specific, into the hands of the alienee. The principle is that the executor or administrator in many instances must sell in order to perform his duty in paying debts, etc., and no one would deal with an executor or administrator if liable afterwards to be called to account. The power of the executor to mortgage the assets has been recognized by high authorities on several occasions.

*Re Morgan*, 18 C. D. 93. Wms. p. 802.

**114.** So the executor may pledge a part of the assets for the purpose of better enabling him to administer the estate, and the pledgee may sell the things pledged if they are not redeemed within the proper time.

*Russell v. Placer*, 18 Beav. 28, 29.

Purchaser  
need not  
see to ap-  
plication  
of purchase  
money.

**415.** It is not incumbent on the purchaser or mortgagee of the assets to see that the money is properly applied, though he knew he was dealing with an executor.

*McLeod v. Drummond*, 17 Ves. 154.

Exception  
to general  
power.

**416.** Exception to the general power of the executor or administrator to dispose of the estate of the intestate or testator will be found in those cases only where collusion existed between the purchaser or mortgagee and the personal representative. That an executor may waste the money is not alone sufficient to invalidate the sale or mortgage. It must further appear that the purchaser or mortgagee participated in the devastavit or breach of duty in the executor.

*Whale v. Booth*, 4 T. R. 625.

Fraudu-  
lent trans-  
fers or  
sales.

**417.** Fraud and covin will vitiate any transaction and turn it to a mere colour. If, therefore, a man concert with an executor by obtaining the testator's effects at a nominal price, or at a fraudulent undervalue, or by applying the real value to the purchase of other subjects for his own behoof, or in any other manner contrary to the duty of the office of executor, such concert will involve the seeming purchaser or pawnee and make him liable to the full value.

*Scott v. Tyler*, 2 Dick. 725.

**418.** Where there exists such collusion as to render the dealing invalid, not only a creditor but a legatee, whether general or specific, is entitled to follow the assets. The right must be enforced within a reasonable time or it will be lost by acquiescence.

*McLeod v. Drummond*, 14 Ves. 154.

Executor  
cannot  
purchase.

**419.** An executor cannot be allowed, either immediately or by means of a trustee, to be the purchaser from himself of any part of the assets, but shall be considered a trustee for the persons interested in the estate, and shall account for the utmost extent of advantage made by him of the subject so purchased.

*Hall v. Hallett*, 1 Cox. 134; *Watson v. Tame*, 6 Madd. 153.

**420.** The executor of a deceased partner is warranted in selling the share of the deceased to the surviving partners, if this can be done fairly and properly. A Court of Justice will look at such a transaction with close attention, for in dealings between the executor of a deceased partner and the surviving partners there may be an inequality in respect of knowledge which may be taken advantage of in such a way as to lead to inequitable and unfair results.

*Chambers v. Howell*, 11 Beav. 6.

**421.** A promissory note or bill or exchange made payable to the deceased or his order, may be indorsed by his executor or administrator, and, generally speaking, there is no difference between the indorsement of a note by the deceased and one by his personal representative.

*Watkins v. Maule*, 2 Jac. & Walk. 243.

Bills of Exchange Act (Dom. Acts, 1890, c. 33, s. 41).

11. (c) Where the drawee is dead, presentment may be made to his personal representative.
2. (a) Where the drawee is dead, presentment is excused and a bill may be treated as dishonoured by non-acceptance.

Section 31. 5. Where any person is under obligation to endorse a bill in a representative capacity, he may endorse the bill in such terms as to negative personal liability.

19. (i) Where the drawer or endorser is dead and the party giving notice knows it, notice must be given to a personal representative such there is and with the exercise of reasonable diligence he can be found.

**422.** An executor may, in some cases, claim by election, as where a testator at the time of his death was entitled out of several chattels to take his choice of one or more to his own use. If a man gives to A. such of his horses as A. and B. shall choose, the election ought to be in the life of A. If a man gives one of his horses to A. and B., after the death of A., B. may choose which he will take for an interest vested in them immediately

Executor may sell partnership share.

Endorsement of bills and notes.

Executor claiming by election.



by the gift. If a lease be granted to A. for 10 or 20 years as he shall elect, the executor is entitled to the election.

**423.** Again, if A. makes a lease for years to B. of 10 acres, parcel of 60, the election may be made by B.'s executors; so if the thing of which election is given is annual, and to have continuance, the heir or executor may make the election.

Old authorities, Wms. p. 814.

**424.** Executors and administrators may by virtue of their office dispose absolutely of terms of years which are vested in them in right of their testators or intestates or make an under lease. But an executor or administrator cannot give an option of purchase at a future time.

*Oceanic Steam Co. v. Sutherland*, 16 C. D. 236.

**425.** If a lease be made for a term of years upon condition that if the lessee shall assign his term without the assent of the lessor it shall be lawful for the lessor to re-enter, the term, nevertheless, vests in the executor or administrator of the lessee without breach of the condition. If a lessor desires to exclude a specific devise of the term it seems he must do so by express terms.

*Woodfall, Landlord and Tenant*, 681.

**426.** When a lease for years with a condition or covenant restraining alienation or underletting comes into the hands of an executor or administrator if named in the covenant, he is bound thereby. If not named it is said to be doubtful whether he is bound.

*Roe v. Harrison*, 2 T. R. 429.

**427.** The executor's power of disposal over assets is not controlled or suspended by the commencement of an action for administration of the estate.

*Reeves v. Burrage*, 14 Q. B. 504.

## CHAPTER V.

## ESTATE OF EXECUTOR AND ADMINISTRATOR.

## TIME OF VESTING.

**428.** As the interest of an executor in the estate of the deceased is derived exclusively from the will, so it vests in the executor from the moment of the testator's death. On the other hand, the administrator derives his title wholly from the Court; he has none until the letters of administration are granted, and the property of the deceased vests in him only from the grant.

*Woolley v. Clark*, 5 B. & A. 745, 746.

**429.** For particular purposes the letters of administration relate back to the time of the death of the intestate, and not to the time of granting them. Thus, although it was held that detinue could not be maintained by an administrator against a person who had got possession of the goods of the intestate after his death, but had ceased to hold them prior to the grant of administration, yet an administrator might have an action of trespass or trover for the goods of the intestate taken by one before the letters granted to him. Otherwise there would be no remedy for this wrongdoing.

*Scarson v. Robinson*, 2 Fost. & F. 351

**430.** By R. S. O. 1897, c. 133, sec. 7 (The Real Property Limitation Act), an administrator claims without interval from the death of the deceased.

**431.** Accordingly it would seem that whenever anyone acting on behalf of the intestate's estate, and not on his own account, makes a contract with another before any grant of administration, the administration will have relation back in order not to lose the benefit of

the contract, so that the administrator may sue upon it as made to himself. Thus where money belonging to a testator at the time of his death, or due to him, and paid in after his death, or proceeding from the sale of his effects after his death, has, before the grant of administration, been applied by a stranger to the payment of the intestate's debts and funeral expenses, the administrator may recover it from such stranger as money had and received to his use as administrator.

*Welchman v. Sturgis*, 13 Q. B. 552.

Movables  
vested in  
presenti.

**432.** All movable goods, though in ever so many different and distant places from the executor, vest in the executor in possession presently upon the testator's death, for it is a rule of law that the property of personal chattels draws to it the possession.

#### QUANTITY OF ESTATE.

Interest in  
lands as  
disting-  
guished  
from  
power.

**433.** A devise of the lands to executors to sell passed the interest in it; but a devise that executors shall sell the land, or that lands shall be sold by the executors, gave them but a power.

*Doe v. Shutter*, 8 A. & E. 995.

Things  
immov-  
able.

**434.** It is otherwise as to things immovable, as leases for years of lands or houses. Of these the executor or administrator was formerly not deemed to be in possession before the entry. (Wms. page 557.) The words of the "Devolution of Estates Act" are that such property, on the death of the deceased, devolves upon and becomes vested in his legal representatives. These words are, probably, sufficient to obviate the necessity for entry.

Interest in  
goods of  
testator.

**435.** The interest which an executor or administrator has in the goods of the deceased is very different from the absolute, proper, and ordinary interest which every one has in his own proper goods; for an executor or administrator has his estate as such in *auter droit* merely, as the minister or dispenser of the goods of the dead.

*Pinchon's Case*, 9 Co. 88, b. 2 Inst. 236.

*Serle v. Bradshaw*, 2 Cr. & M. 148.

**436.** Therefore, the goods of a testator in the hands of his executor cannot be seized in execution of a judgment against the executor in his own right. Execution against goods of executor.

*Farr v. Newman*, 4 T. R. 621; *Kinderley v. Jervis*, 22 Beav. 23.

**437.** With reference also to the principle that an executor or administrator holds the property of the deceased in *auter droit* merely, it has been laid down that in respect to land no merger can take place of the estate held by a man as executor in that which he holds in his own right. Merger.

*Jones v. Davies*, 5 H. & N. 767.

**438.** Though a person is originally entitled to a term, or to an estate of freehold as an executor or administrator, yet in process of time he may become the owner of that estate in his own right. This happens in the case of executors when the executor is also residuary legatee, and he performs all the purposes of the will and holds the estate as legatee; or when the executor pays money of his own to the value of the term in discharge of the testator's debts, and with an intention to appropriate the term to his own use in lieu thereof. Termor or executor may acquire fee.

**439.** Since no man can bequeath anything but what he has to his own use, an executor cannot by his will dispose of any of the goods which he has as executor to a legatee; but, generally speaking, an executor or administrator in his own life time may dispose of and alien the assets of the testator. He has absolute power over them for this purpose, and they cannot be followed by the creditors of the deceased. Executor may alien goods.

*Farr v. Newman*, *supra*.

**440.** It may be proper to consider how the property which the executor or administrator has at first in his representative character may become his own to his own use as his other goods, which he has not as executor or administrator. And first in regard to ready money left by the testator; on its coming into the hands of the executor, the property in the specific coin must of necessity be How estate property may become property of executor.

altered, for when it is intermixed with the executor's own money, it is incapable of being distinguished from it, although he shall be accountable for its value, and therefore a creditor of the testator cannot by fieri facias executed on a judgment recovered against the executor, take such money as *de bonis testatoris* in execution.

But see *re Hallett*, 13 C. D. 696.

Executor  
may take  
specific  
chattel for  
debt.

**441** So if the testator died indebted to the executor, or the executor not having ready money of the testator, or for any other good reason, shall pay a debt of the testator's with his own money, he may elect to take any specific chattel as a compensation; and if it be not more than adequate, the chattel by such election shall become his own.

*Elliott v. Kemp*, 7 M. & W. 313.

Complete  
transmuta-  
tion of  
property.

**442** So if the debt due to him from the testator amount to the full value of all his effects in the executor's hands, and there are no other creditors, there is a complete transmutation of the property in favour of the executor by the mere act and operation of the law; in the former case his election, and in the latter the mere operation of law shall be equivalent to a judgment and execution.

See *contra Hearn v. Wells*, 1 Coll. 333.

Where  
profits of  
lease are  
assets.

**443** So in the case of a lease to the testator, devolved on the executor, such profits only as exceed the yearly value shall be held to be assets; it therefore follows that if the executor pay the rent out of his own purse the profits to the same amount shall be his.

Old authorities, Wms. p. 568.

Executor  
may buy  
testator's  
goods  
where sold  
under fieri  
facias.

**444** If a testator's goods be sold under fieri facias, the executor as well as any other person may buy such goods of the sheriff, and in case he does so, the property which was vested in him as executor shall be turned into his own property.

**445.** As an executor, who is also a legatee, may, by assenting to his own legacy, vest the thing bequeathed in himself in the capacity of legatee; so an administrator, who is also entitled to share in the residue as one of the next of kin under the Statute of Distribution, may acquire a legal title in his own right to goods of the deceased either by taking them by an agreement with the parties entitled to share with himself under the statute, or even without such agreement, by appropriating them as his own share.

*Elliott v. Kemp*, 7 M. & W. 313.

**446.** After administration is granted the interest of the administrator in the property of the deceased is equal to and with the interest of an executor. Executors and administrators differ in little else than in the manner of their constitution.

WHERE NO ESTATE PASSES, BUT A POWER ONLY.

**447.** A testator desired that his executors should sell and dispose of his land, and then appointed them to execute any deeds that might be necessary to the purchaser. Held, that the executors took no interest but a mere power, and consequently that they could not distrain for rent accruing in their own time, before the land was sold.

*Nicholl v. Cotter*, 5 U. C. R. 561.

**448.** If under a will a trustee has a discretion to sell or not to sell real estate, the Court will not interfere by its advice or direction, but will leave the trustee to exercise his discretion.

*In re Trusts of Will of Ann Parker*, 20 Chy. 389.

**449.** A testator having by his will blended his real and personal estate into a fund from which payments of income were to be made to his wife and other devisees, postponed the division of the corpus until after the death of the wife.

Held, that the wife was not bound to elect between her dower and the testamentary bestowments.

*Re Quimby, Quimby v. Quimby*, 5 O. R. 744, distinguished.

The judgment in *Amsden v. Kyle*, 9 O. R. at p. 441, corrected.

*Leys v. The Toronto General Trusts Co.*, 22 O. R. 603.

#### BENEFICIAL INTEREST.

Whole fund not disposed of by executors are trustees.

**450.** Where a will does not dispose of the whole personality, the executors are trustees for the next of kin, unless the will expressly shows that the testator intended they should take the residue beneficially.\*

*Thorpe v. Shillington*, 15 Chy. 85.

Gift with super-added words.

**451.** A testator, by his will, made an absolute gift of all his property to his wife, subject to the payment of debts, legacies, funeral and testamentary expenses, and by a subsequent clause provided as follows: "And it is my wish and desire, after my decease, that my said wife shall make a will dividing the real and personal estate and effects hereby devised and bequeathed to her among my said children in such a manner as she shall deem just and equitable." Held, that this would not create a precatory trust, and that the wife took the property absolutely. If the entire interest in the subject of the gift is given with super-added words expressing the motive of the gift, or a confident expectation that the subject will be applied for the benefit of particular persons, but without in terms cutting down the interest before given, it will not now be held, without more, that a trust has been thereby created. In *re Adams and the Kensington Vestry*, 27 Ch. D. 394, and in *Re Diggles, Gregory v. Edmonson*, 39 Ch. D. 253, specially referred to and followed.

*Bank of Montreal v. Bower*, 18 O. R. 226.

\*Sec. 7 of R. S. O. 1897, c. 127, the Devolution of Estates Act is as follows:

Application of property in payment of debts.

The real and personal property of a deceased person comprised in any residuary devise or bequest shall (except so far as a contrary intention shall appear from his will or any codicil thereto) be applicable rateably according to their respective values to the payment of his debts. R. S. O. 1887, c. 108, s. 7.

**452.** A testator devised to his wife for life a parcel of land "with the power of sale at any time during her life, subject to the consent of my executors." Three executors were appointed by the will, one of whom died. A contract for sale of part of the land having been entered into, it was objected by the purchaser that the consent of the two surviving executors was not sufficient. Held, that in the conflicting state of the authorities upon the question, the title was not one which the Court would force upon a purchaser. Held, also, that under such a power the lands could be sold in parcels.

Consent of surviving executors to sale doubtful if sufficient.

*Re MacNabb*, 1 O. R. 94.

A testator directed his executors to pay all his "funeral charges and just debts." The residue of his estate and property not required for that purpose he disposed of as follows: To his wife all his household furniture, his pew in a named church, and all cash in hand at his decease, also to his wife the entire, exclusive and undivided use of his house situate, etc., to hold the same during her natural life, then the proceeds to be equally divided, etc., he also gave and bequeathed the proceeds of the homestead to be equally divided, etc. There were other lands not mentioned in the will. Held, that R. S. O. c. 107, s. 19, (now R. S. O. 1897, c. 129, s. 18), covered the case. The testator had not indeed within the meaning of that section devised the real estate charged in such terms as that his whole estate and interest therein had become expressly vested in any trustee, but he had devised it to such an extent as to create a charge thereon which the Act in effect transmutes into a trust, and thereupon clothes the executor with power to fully execute that trust by conveying the whole estate of the testator.

Devise of lands charged.

*Yost v. Adams*, 13 A. R. 129.



## CHAPTER VI.

### OF THE EXONERATION OF THE REAL ESTATE BY THE PERSONAL.

Personal  
estate  
primary  
fund for  
debts.

**453.** It is a well-known rule that as between the real and personal representatives of all persons deceased, the personal estate in the hands of the executor or administrator is the primary and natural fund which must be resorted to in the first instance for the payment of debts of every description contracted by the testator or intestate. But this principle could only regulate the equitable administration of assets, and could not extend to the legal control of the creditor of the deceased; for it is discretionary with the creditor, if his debt is of a nature to bind both the real and personal estate, whether he will resort to the personal estate in the hands of the executor or to the real estate descended or devised. Therefore if the obligee of a bond brought an action of debt against the heir, the latter could not plead that there was an executor with assets.

*Galton v. Hancock*, 2 Atk. 426.

In equity  
creditors  
proceed-  
ings  
against  
real estate  
are re-  
imbursed.

**454.** In order therefore to support and enforce the primary liability of the personal estate as between the representatives of the deceased debtor, it is a rule in equity that if the creditor proceeded against the real estate descended or devised, the heir or devisee who sustained the loss should be allowed to stand in the place of a specialty creditor to reimburse himself out of the personal estate in the hands of the executors; provided such reimbursement did not prejudice any of the creditors, or any other party having an equal or a more favored claim with the heir or devisee respectively. Thus if the testator entered into a bond for himself and heirs, and died, and the obligee proceeded against the heir,

and compelled him to pay the debt out of the real assets, the heir might recover it out of the assets in the hands of the executor; and this exoneration was extended not only to the heir-at-law, but also to the general devisee or a particular devisee.

*Gulton v. Hancock, ut sup.*

**455.** Again, it is discretionary with a mortgagee whether he will proceed for the recovery of his mortgage debt against the mortgaged land, which has come to the heir or devisee of the mortgagor, or against his executor. But if the mortgagee recovers against the land, the heir or devisee shall, unless the case comes within the statute, be reimbursed out of the personal estate of the mortgagor. But the land cannot be exonerated out of the personal estate to the prejudice of any person having a prior claim to be satisfied, and therefore the heir or devisee shall not stand in the place of the mortgagee against the personal assets if by so doing he would disappoint any creditor or any legatee, except the residuary legatee or the widow's claim to paraphernalia.

Mortgagee may proceed against land or for debt.

*Lipping v. Lipping, Wms. 736.*

**456.** If a creditor with a general lien on land as a mere bond creditor recovers the bond debt against the real estate devised, the devisee will be entitled to exoneration out of the personal estate to the disappointment of general legacies.

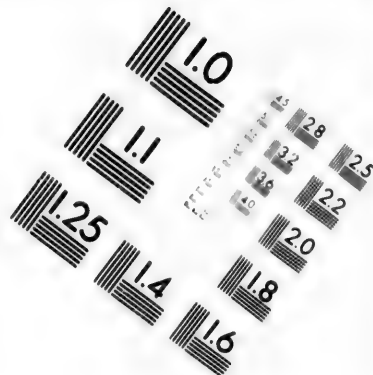
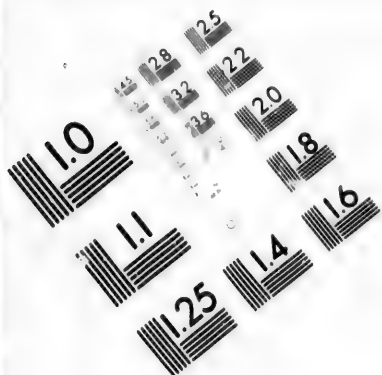
Creditor with general lien proceeding

**457.** The devisee would be entitled to compel the specific legatees to contribute to the payment of the debt, not wholly to exonerate the land.

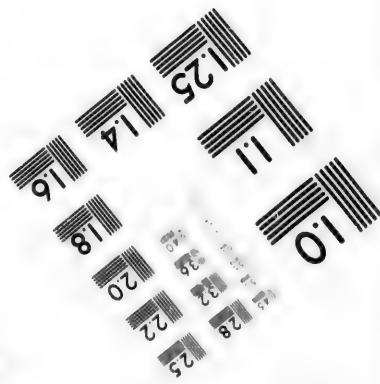
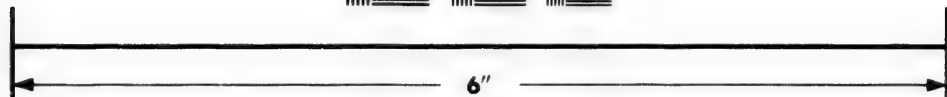
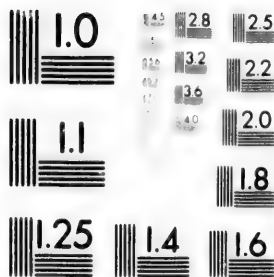
Devisee when entitled to compel exoneration.

*Hearman v. Fryer, L. R. 3 Ch. App. 420.*

**458.** The exoneration of the real estate out of the personal is confined to cases where the claim in question is the proper debt of the deceased; for, if it be not so, his heir or devisee must take the land cum onere. Thus, if a settlor of real estate in contemplation of marriage,



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covenants for payment of the portions of children or widow's jointure; or, if a person makes a voluntary gift by way of charge, and covenants for the payment of the money, the land will be the primary fund for payment, for in this case the charge is in its nature real and the covenant only an additional security.

See *Graves v. Hicks*, 6 Sim. 398.

Legacies directed to be paid out of a mixed residue are a charge on land.

*Young v. Purvis*, 11 O. R. 597.—Proudfoot.

A testator, after directing that his funeral charges and debts should be paid by his executor, disposed of his real and personal estate as follows: First, he gave and bequeathed certain legacies "to be paid out of my estate," and then he gave the residue and remainder of his estate, real and personal, to his son W. absolutely, and he nominated W. his sole executor. He said that the legacies were, by the will charged upon the estate, real and personal, and failing personal estate became a charge on the land; and that W. had power to sell the land, and a purchaser from him was not bound to see to the application of the purchase money.

*Moore v. Mellish*, 3 O. R. 174

Where debts and legacies are charged on real and personal estate, and there is no direction to sell the real estate, the personalty is the primary fund to pay, and the realty is liable only in case of a deficiency.

*Davidson v. Boomer*, 17 Chy. 509, in app. 18 Chy. 475.

A testator by his will bequeathed certain legacies of different amounts to his sons and daughters, and directed his "real and personal property" to be sold by auction, and then added, "And the household furniture also to be sold by auction, and the proceeds of the sale to be equally divided amongst my daughters." Held, that the legacies to the sons and daughters were payable out of the mixed fund of real and personal estate.

*In re Gilchrist-Bohn v. Fyfe*, 23 Chy. 524.

A testator by his will after directing payment of his debts by his executors, gave his personal estate and the dwelling house with the land occupied therewith, to his wife for life, and after her decease to his daughter M., and gave M. a legacy of \$2,000. He then devised the residue of his real estate to his executors in trust, to lease same and pay the interest to his wife for life, and after her death, to sell same and divide proceeds between his children.

share and share alike. At the time of testator's death, the personal estate was of small value, and was exceeded by the amount of the debts; and it did not appear whether, when the will was made, the testator had sufficient personal estate out of which the legacy could be paid.

Held, that M., could not claim to have the \$2,000 paid out of the proceeds of the real estate devised to the executors, but that there should be no reduction from her share by reason of the real estate devised to her.

Held, also that the children of a deceased child took the share of the proceeds of the real estate which their parent was entitled to.

*Totten v. Totten*, 20 O. R. 505.

Products and services charged on land. A testator by his will devised his farm to his grandson charged with the supply of certain products and personal services in favour of a daughter and granddaughter.

On a disagreement between the parties a tender of the products and services was made and refused, and an action was brought to have them declared a charge on the land, and for a money compensation.

Held, that the refusal of the products did not deprive the plaintiffs of the right to recover their value, but that they were not entitled to compensation for the personal services proffered and refused.

*Murray v. Black*, 21 O. R. 372.

Legacy charged on lands. A testator devised to his daughter a lot of land charged with a legacy. The daughter pre-deceased the testator, leaving two children to whom the lot descended.

On an application by the executors at the instance of the Official Guardian, it was:

Held, that it was the duty of the executors to sell the land and pay the legacy.

*Re Eddie*, 22 O. R. 556.

**459.** Again, if a man buys an estate subject to an existing mortgage, the land remains the proper fund for its discharge, and the heir or devisee of the purchaser cannot throw the debt on the personal estate as the primary fund for payment. So if an estate descends on an heir-at-law, or is devised charged with a mortgage debt, and the heir or devisee dies leaving the debt unpaid, the land will be the fund for payment and not the personal estate of the deceased heir or devisee.

Estate  
subject to  
an existing  
mortgage.

When a mortgage by devisee will not charge land.

**460.** Even a direct and original mortgage made by the person to whom land has descended or been devised, will not operate to make his personal estate the primary fund for the discharge of the mortgage debt if the money borrowed was for the purpose of paying off the debts or legacies of the ancestor or devisor; and the law will be the same if a bond or note of hand is given by the heir or devisee for the payment of debts or legacies charged on the land. Although the debt is not originally the debt of the party, yet it is optional in him by the sufficient testimony of intention to render the debt his own, in which case his personal estate will, as between his real and personal representatives, become primarily liable to discharge the debt. But it requires clear evidence of intention to make the debt his own. Thus a charge by will of debts generally on his real and personal estate will not be sufficient of itself to shift the onus from land which came to him already mortgaged, whether by descent or by devise or by sale.

Shifting of mortgage debt from land.

*Lord Ilchester v. Lord Caernarvon*, 1 Beav. 209.

**461.** Sections 37 and 38 of the Wills Act, R. S. O. 1897, c. 128, are as follows:

Mortgage debts to be primarily chargeable on lands Imp. Act, 17-18 V. c. 113.

37. Where any person has died since the 31st day of December, 1865, or hereafter dies seised of or entitled to any estate or interest in any real estate which at the time of his death was or is charged with the payment of any sum or sums of money by way of mortgage, and such person has not by his will or deed or other document signified any contrary or other intention, the heir or devisee to whom such real estate descends or is devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate of such person, but the real estate so charged shall, as between the different persons claiming through or under the deceased person be primarily liable to the payment of all mortgaged debts with which the same is charged, every part thereof according to its value bearing a proportionate part of the mortgaged debts charged on the whole thereof.

Proviso.

(2) Nothing herein contained shall affect or diminish any right of the mortgagee on such real estate, to obtain full payment or satisfaction of his mortgage debt, either out of the personal estate of the person so dying as aforesaid or otherwise; and nothing herein

contained shall affect the rights of any person claiming under or by virtue of any will, deed or document made before the first day of January, 1874. R. S. O. 1897, c. 128, s. 37 (2), (s. 37, R. S. O. 1887, c. 109, s.-s. 2).

(3) Where any person dies on or after the 13th day of April, 1897, seised of or entitled to any estate or interest in any real estate, which, at the time of his death, is charged with the payment of any sum of money by way of equitable charge, including any lien for unpaid purchase money, the provisions of this section shall apply to such charge in the same manner as they would be applicable if such charge were a mortgage. R. S. O. 1897, c. 128, s. 37 (3), (Ont. Acts, 1897, c. 15, s. 4).

38. In the construction of any will or deed, or other document to which the next preceding section of this Act relates, a general direction that the debts, or that all the debts of the testator shall be paid out of his personal estate, shall not be deemed to be a declaration of an intention contrary to or other than the rule in the said section contained, unless such contrary or other intention is further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate. R. S. O. 1897, c. 128 (s. 38, R. S. O. 1887, c. 109).

**462.** Section 37 of the Wills Act which provides that mortgage debts are primarily chargeable on the lands, is not affected by the Devolution of Estates Act.

*Mason v. Mason*, 17 O. R. 325.

Section 37 of the Wills Act: Held, not to apply to cases where the land is charged with the performance of an obligation other than the payment of money.

In a case such as suggested, where the statute was held not to apply, it was considered no bar to the chargee's right to be paid out of the personal estate of the intestate, that he was himself also heir-at-law of the intestate.

*Slater v. Slater*, 3 Chy. Chamb. 1.



## CHAPTER VII.

## MARSHALLING ASSETS.

Claimant  
with two  
funds.

**463.** If a claimant has two funds to which he may resort a person having an interest in one has a right to compel the former to resort to the other, if that is necessary for the satisfaction of both.

Equity  
will  
control  
election.

**464.** This principle is not confined to the administration of the estate of a person deceased, but applies wherever the election of a party having two funds will disappoint the claimant having the single fund, and accordingly the Court of Equity will, if necessary, control that election, and compel the one to resort to that fund which the other cannot reach. But the more general practice is to protect the claimant on the single fund by marshalling the assets.

Purchase  
money  
paid out of  
personal  
estate.

**465.** If the vendor of an estate the contract for which was not completed in the lifetime of the testator, who was the purchaser, is afterwards paid his purchase money out of the personal assets, the simple contract creditors of the testator shall stand in the place of the vendor with respect to his lien on the land sold against the devisee of that estate.

*Selby v. Selby*, 4 Russ. Ch. Cas. 336.

Specific  
devise and  
specific  
legatee.

**466.** A similar equity will be extended in favour of legatees; thus, where a specialty creditor, who has a general lien on the real estate as a creditor by bond, in which the deceased bound himself and his heirs, receives satisfaction out of the personal estate, and thereby exhausts it so as to leave nothing for the payment of legacies, the legatee shall stand in the place of such specialty

creditor as against the real assets which have descended to the heir. But where the real estate does not descend to the heir, but is devised to a stranger, the assets are not marshalled in favour of general legatees so as to throw the creditors on the real assets devised. And this rule is not confined to specific devises of land, but extends to lands which pass under a residuary devise.

*Launcefield v. Iggulden*, L. R. Coll. 136.

**467.** With respect to specific legatees the assets shall be so far marshalled against a specific devisee of real estate upon failure of the general personal estate, that the devisee and specific legatee shall each, in proportion to their respective gifts, contribute to the payment of the specialty debt.

Assets marshalled in favour of general legatees.

*Bateman v. Hotchkiss*, 10 Benv. 426.

**468.** If a creditor has a specific lien on the real estate and resorts to the personalty, the assets will be marshalled in favour of general legatees as well as against real assets devised and descended. Thus, if the real estate subject to a mortgage be devised, and the mortgagee exhausts the personal assets, a pecuniary legatee shall stand in the place of the mortgagee upon the devised estate.

*Middleton v. Middleton*, 15 Benv. 450.

**469.** If a leasehold estate, subject to a mortgage, be specifically bequeathed, the specific legatee must take the legacy cum onere.

Leasehold subject to mortgage specifically bequeathed.

**470.** If the testator's personal estate be insufficient for the payment of his debts and legacies, and consequently the pecuniary legacies are entitled to have the assets marshalled, and to stand in the place of the mortgagee as against the leasehold estate.

Legacy no charge on real estate.

*Johnson v. Child*, 4 Hare, 87.

**471.** Where one or more legacies are charged on the real estate, and there is another legacy which is not so charged; there the legatee which is not so charged shall stand in the place of the former legatees to be satisfied out of the real assets.

*Scales v. Collins*, 9 Hare, 656.

Where the general personal estate of a testator, not specifically bequeathed is insufficient for payment of his debts, a specific legatee of property charged by the testator in his lifetime with the payment of a sum of money must, as between such specific legatee and other specific legatees or devisees, bear the burden of the incumbrance; and a general direction in the will that the testator's debts shall be paid after his decease is not sufficient to throw any part of such burden on the specific devisees of real estate.

*In re Butler; Le Bas v. Herbert* (1894), 2 Ch. 250.

A testator bequeathed a pecuniary legacy to his son B. The personal estate was insufficient to pay the legacy in full after payment of debts and funeral and testamentary expenses.

Held, that B. was entitled to have the assets marshalled so as to stand in the place of creditors against the real estate so far as the debts, funeral and testamentary expenses had been paid out of the personality.

*In re Salt; Brothwood v. Keeling* (1895), 2 Ch. 203.

**472.** The Court will not marshal assets in favour of a charitable bequest, so as to give it effect out of the personal assets, it being void so far as it touches any interest in land.

No mar-  
shalling in  
favour of  
a charity.

*Peaumont v. Olivera*, L. R. 4 Ch. 300.

Marshalling.

*In re Staebler*, 21 A. R. 206.

Where a testator gave to a charity after a pecuniary legacy all the residue of her personal estate, "save and except such parts thereof as cannot by law be appropriated by will to charitable purposes."

Held, that the gift of the residue did not operate as a direction to marshal the estate in favour of the charity, and that the impure personality passed to the next of kin.

*In re Somers-Cocks; Wegg-Prosser v. Wegg-Prosser* (1895), 2 Ch. 419.

## PART III.

### CHAPTER I.

#### DUTIES OF EXECUTORS.

##### 1. FUNERAL.

**473.** It is now proposed to consider the duties of <sup>Funeral</sup> an executor or administrator, and first, he must bury <sup>expenses,</sup> the deceased in a manner suitable to the estate he <sup>limit for.</sup> leaves behind him. Funeral expenses, says Lord Coke, according to the degree and quality of the deceased are to be allowed of the goods of the deceased before any debt or duty whatsoever. But the executor or administrator is not justified in incurring such as are extravagant even as it respects legatees or next of kin, nor as against creditors' wish he is not warranted in paying more than that which is absolutely necessary. In strictness, says Lord Holt, no funeral expenses are allowed in the case of an insolvent estate except for the coffin, ringing the bell, and the offices of the parson, clerk and bearers; but not for the pall or ornaments.

*Shelly's Case*, 1 Salk. 296.

##### 2. INVENTORY.

**474.** Executors must make a true and perfect in- <sup>Inventory</sup>ventory of all goods and chattels belonging to the de- <sup>required.</sup>ceased, and file the same on oath with the Surrogate Clerk.

The Surrogate bond is conditioned among other things for the exhibiting of true and perfect inventory of the goods, chattels and credits, of the deceased. In modern practice inventories are not required to be exhibited

Contents  
of inven-  
tory.

without being called for. In cases where there has been a great lapse of time between the death of the party and the citation calling for the inventory, the Court has frequently refused to enforce the exhibition of an inventory. The parties who may be cited to exhibit an inventory and account are not confined to the executor or administrator, but very often to those who, upon the death of the executor or administrator, succeed to the representation of the original testator or intestate. An inventory exhibited by an executor or administrator ought to contain a full, true and perfect description and estimate of all the chattels, real and personal, in possession and in action to which the executor or administrator is entitled in that character as distinguished from the widow, or the donee mortis causa of the testator or intestate. It must also distinguish such debts as are separate from those which are doubtful or desperate. It cannot call for an account of the subsequent profits in the testator's business.

*Pitt v. Woodham*, 1 Hagg. 250.

### 3. REGISTRATION OF WILL.

Registra-  
tion of will

**475.** Although it cannot be said that the registration of the will is actually the duty of the executor, no more appropriate place than the present can be found for stating the mode provided by our statutes for registering wills, and the effect of registering. R. S. O. 1897, c. 136, The Registry Act provides as follows:

Registra-  
tion of  
lease.

70.—(1) Every will shall be registered at full length by the production of the original will and the deposit of a copy thereof, with an affidavit sworn to by one of the witnesses to the will, proving the due execution thereof by the testator, or by the production of probate or letters of administration, with the will annexed, or an exemplification thereof under the seal of any Court in this Province, or in Great Britain and Ireland, or in any British province, colony, or possession, or in any foreign country having jurisdiction therein, and by the deposit of a copy of the probate, letters of administration, or exemplification, with an affidavit verifying such copy.

(2) Where the copy of a will or of letters of probate or letters of administration has attached to it, when left or offered for registration in the registry, an affidavit or statutory declaration by the executor or administrator to the effect that, after making the will, the testator has made no conveyance or parted with lands in the will described by local description, and that it was not intended or desired that the registration of the will should affect such lands, and if, in addition, it appears by the registered entries respecting such lands that the testator had parted with all his interest in or title to the said lands, the registrar shall not register, copy or enter the will as an instrument affecting such lands, nor shall he be entitled to any fees for registering and making entries and certificates in respect thereof, but shall only be entitled to the same fees, in respect of the registry of such will, as he would have been entitled to had the will not contained any devise or gift of or reference to such lands by local description.

(3) Where a will is registered by the production of the original will, the affidavit of the subscribing witness, or some other person must state that the testator is dead, either to the knowledge of the deponent, or as he has been informed and believes. Ont. Stats. 1893, c. 21, s. 70.

(4) After a will which has not been admitted to probate has been registered in the manner hereinbefore provided in any registry division, such will may be registered in any other registry division, by the deposit of a copy thereof, certified under the hand and seal of the registrar of the division in which such first mentioned registration took place, to be a true copy of the will, as recorded in the said registry division, and the registrar shall in his certificate state that an affidavit proving the due execution of the will has been deposited in his office. Ont. Stats. 1893, c. 14, s. 20.

71. Letters of administration which, under the Devolution of Estates Act, affect lands, may be registered in the same manner as probates of wills are now registered, and the registrar shall be entitled to charge for registering letters of administration, without a will annexed, including all entries in respect thereof, a fee of one dollar. Ont. Stat. 1893, c. 21, s. 71.

**476.** The following clauses relate to the effect of registering a will:

89. All wills, or the probates thereof, registered within the space of twelve months next after the death of the testator, shall be as valid and effectual against subsequent purchasers and mortgagees, as if the same had been registered immediately after such death, and in case the devisee, or person interested in the lands devised

Registration of will where testator has made subsequent conveyance to lease.

Proof of testator's death.

Subsequent registration of will in other registry divisions.

Registration of letters of administration, Rev. Stat., c. 127.

Will to be registered within 12 months from death of testator.

in any such will, is disabled from registering the same within the said time by reason of the contesting of such will or by any other inevitable difficulty without his or her wilful neglect or default, then the registration of the same within the space of twelve months next after his attainment of such will or probate thereof, or the removal of the impediment aforesaid, shall be a sufficient registration within the meaning of this Act. Ont. Stat. 1893, c. 21, s. 86.

Registration to be notice.

92. The registration of any instrument, under this Act, or any former Act, shall constitute notice of the instrument to all persons claiming any interest in the lands subsequent to such registration, notwithstanding any defect in the proof for registration, but nevertheless it shall continue to be the duty of every Registrar not to register any instrument, except on such proof as is required by this Act. Ont. Stat. 1893, c. 21, s. 89.

Interpretation "Will."

**477.** By the interpretation section (1) of the Act, "instrument" includes "will, probate of will, grant of administration." Also the word "will" includes probate of will and exemplification or notarial or prothonotarial copies of probate of will, and letters of administration with the will annexed, and any devise whereby lands are disposed of or affected.

Registration of will.

*O'Neil v. Owen*, 17 O. R. 525.

#### 4. INSURANCE OF PROPERTY.

Insurance of property.

**478.** An executor was formerly in doubt whether it was within the scope of his duty to insure premises, part of the estate. This doubt is now removed by the following clause, which is embodied in The Trustee Act (R. S. O. 1897, c. 129):

Powers of trustee to insure trust property. Imp. Act, 51-52 V. c. 59, s. 7.

21. (1) It shall be lawful for, but not obligatory upon, a trustee to insure against loss or damage by fire any building or other insurable property to any amount (including the amount of any insurance already on foot) not exceeding three equal fourth parts of the full value of such building or property, and to pay the premiums for such insurance out of the income thereof or out of the income of any other property, subject to the same trusts, without obtaining the consent of any person entitled wholly or partly to such income.

(2) This section shall not apply to any building or property which a trustee is bound forthwith to convey absolutely to any cestui que trust upon being requested to do so. Ont. Acts, 1891, c. 19, s. 12.

**479.** The consequences of a failure to insure or keep insured, may in some cases be rendered less onerous by the following section of the Judicature Act. R. S. O. 1897, c. 51.

30. The High Court shall have power to relieve against a forfeiture for breach of a covenant or condition in any lease to insure against loss or damage by fire, where no loss or damage by fire has happened, and the breach has, in the opinion of the Court, been committed through accident or mistake, or otherwise without fraud or gross negligence, and there is an insurance on foot at the time of the application to the Court in conformity with the covenant to insure upon such terms as to the Court may seem fit. Relief against forfeiture of covenants to insure in certain cases Imp. Act. 22-23 V. c. 35 Ont. Acts, s. 4. 1895, c. 12, s. 26.

#### 5. PAYMENT OF TAXES.

**480.** An executor must take care to keep down the taxes on the land forming part of the estate. The mode of assessment is as follows (R. S. O. 1897, c. 224, The Assessment Act):

46.—(1) Personal property in the sole possession, or under the sole control of any person or as trustee, guardian, executor or administrator, shall be assessed against such person alone. Cases of executor, etc.

(2) Where a person is assessed as trustee, guardian, executor or administrator, he shall be assessed as such, with the addition to his name of his representative character, and such assessment shall be carried out in a separate line from his individual assessment, and he shall be assessed for the value of real and personal estate held by him, whether in his individual name, or in conjunction with others in such representative character, at the full value thereof, or for the proper proportion thereof, if other residents within the same municipality are joined with him in such representative character. Persons assessed as trustees etc. to have their representative character attached to their names. Ont. Acts, 1892, c. 48, s. 41.

#### 6. COLLECTION OF ASSETS.

**481.** The next duty of the executor or administrator is to collect all the goods and chattels so inventoried, for that purpose the law invests him with large powers, and it is incumbent upon him to avail himself of his authority with reasonable diligence in the collection of the effects of the deceased. Executor must collect goods and chattels.



Executor  
personally  
liable for  
delay.

**482.** Therefore if by unduly delaying to bring an action the executor or administrator has enabled a creditor of the deceased to avail himself of the Statute of Limitations, the executor or administrator will be personally liable.

*Hayward v. Kinsey*, 12 Mod. 573.

Executor  
must  
exercise  
reasonable  
discretion.

**483.** Executors should proceed with promptitude to realize the assets; and the law presumes that, as a general rule, a year should be sufficient for this purpose. They should exercise a reasonable discretion as to suing debtors, and preserve evidence of having done so in the case of uncollected debts, the onus of proof being on them, and not on the legatees. But where the result proves unfortunate, they are not charged with the loss, though the Court should not concur in the propriety of the course, which, in the bona fide exercise of their discretion, they took. A delay of ten months, which resulted in the loss of a debt, was held to require explanation.

*McCargar v. McKinnon*, 15 Chy. 361.

Liability  
for rents  
and profits

Delay on the part of executors to sell lands, which by the will are saleable for payment of debts will render the executors liable for rents and profits.

*Emes v. Emes*, 11 Chy. 325.

**484.** Section 9 of The Trustee Act, R. S. O. 1897, c. 129, is as follows. It is intended for the protection of persons paying money to others who are trustees.

Receipt of  
trustees to  
be effectual  
discharges

9. The bona fide payment of any money to, and the receipt thereof by any person to whom the same is payable, upon any express or implied trust, or for any limited purpose, and such payment to and receipt by the survivors or survivor of two or more mortgagees or holders, or the executors or administrators of such survivor, or their or his assigns, shall effectually discharge the person paying the same from seeing to the application, or being answerable for the misapplication thereof, unless the contrary is expressly declared by the instrument creating the trust or security. R. S. O. 1897, c. 129, s. 9 (s. 8, R. S. O. 1887, c. 110).

## 7. PAYMENT OF SUCCESSION DUTIES.

**485.** One of the first duties of the executor after ascertaining the amount of the estate come to his hands is to provide for succession duty. This duty is a tax by Government on estates of persons deceased, when those estates reach a certain value. As the amount is large it is only in exceptional cases that the question need be considered. But, as in these exceptional cases the interests involved are of importance, a clear understanding of the scope and intention of the Succession Duties Act is very necessary.

A testator devised and bequeathed all his real and personal estate to his executors and trustees for the purpose of paying a number of pecuniary legacies, some to personal legatees, and others to charitable associations, and provided that the residue of his estate should be divided pro rata among the legatees.

Held, that it was the duty of the executors to deduct the succession duty payable in respect of the pecuniary legacies, before paying the amounts over to the legatees, and they had no right to pay such succession duty out of the residue left after paying the legacies in full.

*Kennedy v. Protestant Orphans' Home*, 25 O. R. 235.

**486.** As our system in Ontario is founded upon the English Acts it is well to have some knowledge of the English system.

In England before the Finance Act of 1894 (57 & 58 Vict. c. 30), there were five kinds of duties payable on the death of a testator or intestate, known as probate, account, legacy, succession and estate duties. The probate and account duties were payable out of the general assets of the deceased, the legacy, succession and estate duties were payable by the persons who benefitted by the legacy or succession. Probate duty was first introduced in 1694, legacy duty in 1780, succession duty in 1805, account duty in 1881, and estate duty in 1889. Some knowledge of these various kinds of duties is necessary in order to understand our present system.

Probate  
duty.

**487.** Probate duty was a stamp duty on affidavits for probate and letters of administration in the case of persons dying domiciled in the United Kingdom, varying with the amount of the estate.

**488.** Probate duty was the oldest form of death duty, having been established in 1694 (5 & 6 William and Mary, c. 21). It was called because it was collected by means of a stamp impressed on the grant of probate or letters of administration, such stamp denoting the amount of duty paid.

Definition  
of probate  
duty.

**489.** Probate duty may be defined to be the price paid for clothing the executor or administrator with the right to take possession of the personal estate of the deceased person. The duty was payable in respect of the value of all personal estate of the deceased person, of which the executor became capable of taking possession by the mere fact of obtaining the grant of probate or administration. The duty was only payable in respect of personal property within the jurisdiction of the Court, by which the grant was made, and from which the authority of the executor emanated.\* Since the duty was payable on everything of which the executor had a right to take possession by the mere fact of obtaining the grant, it followed that personal estate chargeable with duty included real property which at the time of the death of the deceased was personal estate in the eye of the law. Thus real property which the deceased had contracted to sell was chargeable with duty, so also was a share in the assets of a partnership, notwithstanding that they consisted of real property.

Estates  
*pur autre  
vie.*

**490.** Estates *pur autre vie* in realty, although applicable by law as personal estate, continue in the eye of the law to be real estate, and were not chargeable with duty, nor did any direction of the deceased for converting

\* See *Att.-Gen. v. Dimond*, 1 Cr. & J. at 369, and *Att.-Gen. v. Brunning*, 4 H. & M. 94. As to estate *pur autre vie*, see *Chatfield v. Berchtoldt*, L. R. 7 Ch. App. 192.

his real estate into personal estate render it chargeable with duty if it was in effect real estate when he died, as, for instance, a direction contained in the will for an immediate sale.

**491.** Probate duty was, therefore, payable or not <sup>Probate duty payable on personal estate</sup> payable, according to what was the condition of the property at the time of the death, if it was then personal estates, duty was payable, if it was not, duty was not payable.

**492.** By personal property was understood every <sup>Personal estate defined</sup> interest of the deceased in personal property, whether in possession or remainder, whether vested or contingent, also personal property of which the deceased disposed by his will under a general power.

**493.** Property to which the deceased was only <sup>Trust property not subject.</sup> entitled as trustee for other persons was not subject to probate duty.

**494.** The principal Imperial Probate Act was 55 <sup>Probate duty abolished.</sup> Geo. III. c. 184 (1815). Probate duty was abolished after 1st August, 1894.

**495.** Account duty was at the same rate as the probate duty. <sup>Account duty.</sup> The property on which the duty was payable included (a) *donationes mortis causa*, (b) property voluntarily transferred to the deceased and any other person jointly so that a beneficial interest accrued to the latter by survivorship, (c) property passing by a voluntary settlement with a reservation of life interest to the settlor, or with any trust in favour of a volunteer, and whether made for valuable consideration or not, (d) money received under a policy of life insurance. The account was to be delivered by every person who acquired possession or assumed the management of any personal property of the foregoing descriptions.

**496.** Account duty was established in 1881 by <sup>Object of account duty.</sup> section 38 of 44 Vict. c. 12, its object being to prevent the

evasion of probate duty by gifts of property made in anticipation of death, or so framed as to enable the person making them to retain the control or enjoyment of the property during his life. Section 38 was amended by section 11 of 52 Viet. c. 7, and as amended is incorporated in the Imperial Finance Act of 1894, as will be seen later.

Legacy  
duty.

**497.** Legacy duty was originally imposed in 1780, 20 Geo. III. c. 28. The tax, after some changes, was finally imposed as a duty on property actually given to or devolving on the legatee or next of kin.

Legacy  
duty on  
what  
charge-  
able.

**498.** Legacy duty was chargeable not only on legacies, but upon gifts such as residue, rent charges, annuities, benefits derived from appointments under powers, of money charged on real estate, and even forgiveness of a debt due to the testator. Legacy duty attached not only on gifts by will, but also on the devolution of shares under an intestacy. The person primarily liable to pay was the executor or administrator.

How  
legacy  
duty  
became  
payable.

**499.** Legacy duty became payable only under a will or an intestacy—the term legacy being applied equally to a share of personal property passing under an intestacy as to a gift by will.

Difference  
between  
legacy  
duty and  
probate  
duty.

**500.** Legacy duty differed from probate duty by looking to domicile and not to jurisdiction. In the eye of the law *mobilia sequuntur personam*,\* personal property devolving under an intestacy presented no difficulty. There whatever came to the next of kin of the intestate paid duty as a legacy, but personal property devolving under a will in order to be liable to a legacy duty had to go to the person taking as an act of bounty from the testator. It must, in fact, have been a gift.

\* Thus, an American, domiciled in England, may by his will leave £100,000 consols to a legatee, but no legacy duty is payable. Where the domicile of the deceased was British his assets may consist of foreign government securities, debts due from foreigners, ships on the high seas, but no matter what they are, so far as they go to the legatee or next of kin legacy duty was payable. Hanson (1897) p. 20. See *Thomson v. Adr. General*, 12 Cl. & Fin. 1.

As to partnership interests out of the United Kingdom, see *Forbes v. Stevens*. L. R. 10 Eq. 479.

**501.** A legacy may be given two ways. It may be <sup>How</sup> a gift out of the testator's own free personal estate, and <sup>legacy</sup> simply attributable to his bounty, or it may be a gift out <sup>may be</sup> of personal estate which did not belong to the testator, <sup>given.</sup> but of which he had power to dispose.

**502.** Where a legacy is given in exercise of a <sup>Legacy</sup> general power the legatee takes it through the bounty of <sup>given</sup> the person exercising the power. Where the legacy is <sup>under</sup> given in exercise of a special power the legatee takes it <sup>general</sup> through the bounty of the person creating the power. In the former case it does not matter whether the power was created by deed or by will, for it is the exercise of the power that is the governing factor.

**503.** In the case of a legacy under a special power, <sup>Legacy</sup> unless the power was created by will, the act of bounty <sup>under</sup> proceeds from the person creating the power. Where a <sup>special</sup> general power is created by a will, and is exercisable either by deed or by will, and it is, in fact, exercised by deed, the appointee takes simply under the deed. But if a special power is created by a will, and is exercisable either by deed or by will, and is, in fact, exercised by deed, in such a case the appointee takes a gift under the original will.

*Att.-Gen. v. Pickard*, 3 M. & W. 552.

**504.** The person who, under a will, took a limited <sup>Person</sup> interest in personal property, and also a general power of <sup>with</sup> appointment over it, was considered, upon exercising that <sup>general</sup> power either by deed or by will, to have received a <sup>power</sup> legacy under the original will.

**505.** Where a person got under a will a general <sup>Person</sup> power of appointment over personal property, whether <sup>taking</sup> he also took a limited interest or not, which in default of <sup>interest in</sup> appointment went to him absolutely, then quite inde- <sup>default of</sup> pendently of his exercising the power he was held to have <sup>appoint-</sup> received the legacy under the original will. <sup>ment.</sup>

36 Geo. III., c. 52, s. 18.

How  
legatee  
was ascer-  
tained.

**506.** As to who was the legatee under a will the rule was that the will alone was to be regarded in determining who was the legatee for the purposes of duty. A testator might give property to A. on all kinds of secret trusts, but A. was the legatee, so far as the revenue was concerned. Or, the testator might direct the actual legatee to be selected by his executors or other persons, and the person so selected was the legatee for such purposes.

*Cullen v. Att.-Gen. for Ireland, L. R. 1 Eng. & Ir. App. 190.*

Legatee  
not taking  
benefit of  
legacy.

**507.** The legatee was none the less a legatee for purposes of duty that he did not live to enjoy his legacy, and did not dispose of it. The only question being whether the legacy must travel through his estate in order to get to the person actually claiming it. Thus, where a testator gave the legacy to a son, who died in the testator's lifetime intestate, leaving issue, by virtue of the Wills Act the gift taking effect as if the death of the son had immediately followed that of the testator, the son was a legatee, and the duty had to be paid on the property as a legacy from the father to the son, and again as a legacy from the son to his next of kin. It was otherwise where a testator gave the legacy to A., or if he be dead to the persons who would have been entitled thereto if A. had died immediately after him (the testator), and A. died before the testator. In such a case the testator himself marked out the persons to take in the event which happened of A.'s death, and A. was not a legatee, and the legacy was considered to devolve directly to the persons indicated by the testator.

*See Att.-Gen. v. Lloyd, 1895, 1 Q. B. 496.*

Duty  
a personal  
charge.

**508.** The duty itself was a personal charge on the value of the legacy, calculated according to the relationship between the testator from whom the legacy was taken to come and the legatee.

When  
duty fell  
due.

**509.** The duty fell due at the death, but was payable on the value of the gift or legacy as it stood when

the duty was paid, that is, with all accretions to the original amount.

**510.** If a legatee disclaimed his legacy no duty was chargeable in respect of it as a legacy to him, but where once a legatee showed his acceptance of a legacy, although not actually paid over, his executors could not disclaim it so as to affect the duty. If a legacy was released for some consideration, or compounded for less than its value, duty was payable according to the value of the consideration or composition. If a legacy was given in satisfaction of another legacy, duty was paid on the subject yielding the largest duty. The executor was primarily liable for the duty, and it became actually payable so soon as the legacy was paid to or retained for the benefit of the legatee. A severance or setting aside of the legacy for purposes of administration did not amount to retainer for this purpose. It had to be so appropriated as to take it out of the possession or control of the executors, and to discharge them from further liability in respect of it.

*Att.-Gen. v. Munby*, 3 H. & N. 826.

**511.** Of all the death duties Legacy duty was the least affected by the Finance Act of 1894; its incidence and the method of its calculation remain the same, only the class of exemptions is somewhat widened.

Hanson (1897), p. 19.

**512.** Succession duty was a duty imposed on succession to real and settled personal property at the same rate as that attaching under Legacy duty. It was payable only on property which was not subject to Legacy duty, and in no case was more than one of the duties payable on the same property.

**513.** Succession duty was a tax placed on the gratuitous acquisition of property which passed on the death of any person by means of a transfer, which might be either a disposition or a devolution from one person



called the predecessor, to another person (the successor). Property chargeable with this tax was called a succession.\*

(1) *What Property could be the subject of the tax.*

What property could be subject of taxation.

**514.** The property which could be the subject of this tax was all real and leasehold estate situate in the United Kingdom, and all personal property not subject to legacy duty. Thus estates in land for life in tail, in fee, and for years were subject to succession duty as were also the corresponding interests in personal estate except where legacy duty was payable. If the forum of administration of the property was in the United Kingdom it was property liable to become subject to succession duty.

Testator domiciled abroad.

**515.** If a testator domiciled abroad by his will bequeathed his personal estate in such a manner as would if he were domiciled in England create liability to succession duty, no succession duty was payable, although he might possess personal estate in England, because the forum for administration of his estate was not English.

Succession arising under an English settlement.

**516.** On a succession arising under an English settlement (that is, in English form) of property invested in England with trustees resident in England, the duty was payable, although the settlor might have been or might be domiciled abroad, and although the persons entitled to the property were domiciled abroad.

*Re Lorelace*, 4 De G. & J. 340.

Succession created under general power of appointment.

**517.** A succession created by the exercise of a general power of appointment was liable to succession duty if the settlement (whether by deed or will) which created the power was an English settlement. It made

\*A, by deed settled real estate on himself for life, remainder to his first son B, and the heirs of his body, with remainder to his second son C, and the heirs of his body, with remainder over.

Suppose A. died leaving B. alive who took possession and died without barring his estate tail. If A. left a son, he took by devolution from B. But if B. died without issue, and C. or one of his issue came into possession he took by disposition from A. the settlor.

no difference as to liability to succession duty whether the property was invested in England in pursuance of the specific directions of the settlement, or in consequence of the trustees' exercise of a discretion lodged in them by the settlement or in consequence of the property having been so invested prior to the settlement and allowed to remain unchanged.

*Re Wallop's Trusts*, 1 De G. J. & S. 656.

**518.** The ultimate test whether a settlement was English or not was the locality of the Court to which the beneficiaries would have to apply for administration of the trusts of the settlement as against the trustees.

Ultimate  
test  
whether  
settlement  
was  
English.

*Re Cigala*, 7 Ch. D. 351.

(2) *The conditions of the incidence of succession.*

**519.** There must have been a transfer, the effect of which was to make some person beneficially entitled upon a death, and the date of the death must have been since the 19th May, 1853, the date when the Succession Duty Act came into operation. For example: A settlement by which property was limited to A. for life, remainder to B., conferred a succession on B., and made him liable to duty whatever the date of the settlement, provided only that A. died after the 19th May, 1853.

Transfer  
required to  
make  
succession

*Att.-Gen. v. Lord Middleton*, 3 H. & N. 125.

**520.** Succession duty was payable by a successor who came into possession on a death, although he would by a lapse of time come into the same property if the death had not taken place. Thus, a gift to A. until the expiration of twenty-one years, or until he died, whichever might first happen, the remainder to B. if A. died before the end of twenty-one years, conferred a succession on B.

Successor  
ultimately  
going into  
possession.

*Att.-Gen. v. Noyes*, 8 Q. B. D. 125.

Interest on  
succession  
not ac-  
quired un-  
til after  
death.

**521.** A person became entitled on a death so as to be liable to succession duty, although the interest of a succession was not required until the lapse of an interval after death. Thus, a testator leaving property to his widow during widowhood, and then to A.; on the widow's re-marriage, A. took upon the testator's death after an interval, and was liable for duty.

Reversion-  
ary or  
contingent  
interest.

**522.** The interest acquired by a successor on the death of any person need not be immediate or even certain. A reversionary, or contingent interest acquired on a death rendered the person entitled to it liable to duty, although the duty was not payable, unless and until the person liable had beneficial possession of the property.

*Att. Gen. v. Gell*, 3 H. & C. 615.

Difference  
between  
disposi-  
tion and  
devolution

**523.** The transfer might be either by disposition or devolution of law. A disposition comprised any sort of conveyance, will, assignment, covenant, undertaking contract, act or obligation by which one person conferred a beneficial interest in property on another otherwise than for money or moneys worth.

*Att.-Gen. v. Montefiore*, 21 Q. B. D. 461.

Cases  
where suc-  
cession  
duty did  
not attach.

**524.** Succession duty did not attach in cases of sale and purchase. Thus not only were ordinary purchases of reversionary interests in real or personal estate not subject to duty, but also every species of interest which would show that the substance of the transaction was not derived from any predecessor in succession. Marriage settlements were dispositions which gave rise to succession duty. The marriage being the cause and motive of the settlement, decided its character for the purpose of succession duty.

*Lord Advocate v. Sidgwick*, 4 Sco. Sess. Cas., 4th Ser., 815.

Devolu-  
tion by  
law.

**525.** Devolution by law included cases of transmission of an ancestors property on his death intestate to his heir and next of kin, and also the case of an heir

succeeding to an estate *pur autre vie* as special occupant. The predecessor was the settlor, testator or donor, who conferred the property.

**526.** The person whose death gave rise to the liability to succession duty might be anyone, and need not be, and often, in fact, was not the predecessor. If there were more predecessors than one, and the proportional interest derived from each was not distinguishable, then, in default of an agreement being come to with the revenue, the succession was deemed to take from each successor in equal proportions.

16 & 17 Vict. c. 51, sec. 13.

**527.** The successor was the person on whom the property was conferred. Mere trustees and executors were not successors, because they did not take a beneficial interest in property, and it was a beneficial acquisition of property which created a liability to succession duty.

16 & 17 Vict. c. 51, s. 2.

**528.** It was a matter of great importance to determine in a particular case who was the predecessor and what was the disposition or devolution under which a given succession arose. The following rules have been stated: (1) An heir coming into possession either as heir in tail or in fee as of a previous holder took for the purpose of succession duty by devolution from the last possessor of the estate, who was the predecessor.

*Lord Saltoun v. Adv. Gen.*, 3 Macq. 673.

(2) Where a person coming into possession did so as a person named or designated, he took for the purpose of succession duty by disposition from the settlor or testator, who was the predecessor.

*Earl of Zetland v. Lord Adv.*, 3 App. Cas. 505.

(3) Where a succession was created by the exercise of a power of appointment (whether general or special) the instrument creating the power whether a deed or

will, was the disposition. The appointment was read into this instrument, and the predecessor ascertained accordingly.

*Re Lorcree*, 4 De G. & J. 340.

*Re Barker*, 7 H. & N. 109.

Except in the two cases following:

(a) If the power was a general power which could be exercised by the donee for his own benefit, and which took effect upon the death of any person, then the donee of the power, when he exercised it, was to be taken to be entitled to a succession from the donor of the power. And if the donee of the power so exercised the power as to create a new succession, he became the predecessor, his appointment the disposition, and his appointee the successor.

For example—X. by deed settled property on A. for life the remainder to B. (A.'s husband) for life, remainder in default of issue of A. and B. as A. should appoint. This power took effect on B.'s death without issue, and if A. survived and exercised the power she took a succession from X., and if she so appointed as to create a succession, she was the predecessor, and the instrument of appointment the disposition.

(b) If the power was a general power, and the property in default of appointment went to the donee of the power absolutely, it was considered that any transfer (creating a succession) by him, whether by appointment or conveyance, was a disposition by him, as predecessor.

*See Att.-Gen. v. Charlton*, 4 App. Ca. 444.

(4) Succession duty being essentially a tax on the transfer of property, it followed that a person could not confer a succession on himself, so as to render himself liable to duty in respect of that succession, for in such a case there was in reality no transfer at all.

*Lord Braybrooke v. Att.-Gen.*, 9 H. L. C. 158.

(5) A person could not take a succession on his own death. This followed necessarily from the provisions of

the statutes relating to succession duty, under which no one was liable to pay the duty unless and until he was in actual enjoyment of the property.

16 & 17 Vict. c. 51, s. 19.

**529.** A succession arose wherever there were the <sup>Three factors for succession.</sup> three factors, viz., a predecessor, a successor, and a disposition or devolution conferring an interest to take <sup>"Postponed succession."</sup> effect on a death. Sometimes the succession was "postponed." Suppose property vested in A. by some gratuitous title, which did not create a succession, to be subject to a charge of £100 a year in favour of B. for his life, on B.'s death, as A. gets an increase of benefit to the extent of the annuity, which then ceases, he was said to have "postponed" succession.

16 & 17 Vict. c. 51, s. 5.

**530.** There could be a succession subject to a <sup>Succession subject to charge or interest.</sup> charge or interest. If the charge was created by the expectant successor himself and did not confer a separate or new succession, he had to pay duty when the succession fell into possession exactly as if he had created no such charge. If the charge had not been created by the expectant successor, then the successor paid duty on the property minus the charge, and on the determination of the charge he paid on the increased value of the succession which then accrued to him. Thus, under a will property is charged with an annuity to X. for her life, and subject thereto settled on A. On the death of the testator A. paid duty on the property, less the annuity, and on the death of X. paid duty on the increased value of the succession represented by the amount of the annuity.

*Re Peyton*, 7 H. & N. 287.

**531.** Again, a case of succession duty payable at a <sup>Succession duty payable at deferred period on an increase.</sup> deferred period on an increase of beneficial interest could arise in another way. A gratuitous transfer of property made to take effect in praesenti so that no succession was created, but the grantor reserved a benefit to himself or some other person ascertainable only by reference to

death. In such a case the grantee as successor was deemed to take a succession on the determination of the reserved benefit, the annual value of which was equal to the annual amount or value of the reserve benefit. Thus, A. by deed of gift granting real estate to B., reserving to himself a life annuity, no duty was payable on the execution of the deed, because no succession was created; but on A.'s death B. became liable for duty as on a succession from A., the annual value of which was equal to and measured by the annuity.

*Att.-Gen. v. Noyes*, 8 Q. B. D. 715.

Acceleration of title to succession.

**532.** But where the title to a succession was accelerated by the surrender or extension of a prior interest, the duty was still payable at the same time and in the same manner as if no acceleration had taken place. Thus, suppose property settled on A. for life, remainder to B., and A. assigned his life interest to B., B. did not pay duty until the death of A.

See *Ex p. Sitwell*, 21 Q. B. D. 466.

(3) *Who had to pay the duty.*

Succession duty when payable.

**533.** Succession duty was not payable until the property which constituted the succession was in actual enjoyment. The liability to the duty attached from the moment of the creation of the succession, but payment of the duty was not enforceable until the property was in possession; thus, property settled or devised by X. in favour of A. for life, remainder to B., so that X. was the predecessor and B. had a succession expectant on A.'s death, the liability to duty existed from the date of the settlement, or the death of the testator, as the case might be; but no duty was payable by B. until A.'s death reduced B.'s succession into possession. The lapse of time between the creation and the discharge of the liability to succession duty and the changes which events, or the acts of the original successor might produce in the ownership of the property during this interval, might produce all sorts of complications.

See 16 & 17 Vict. c. 51, s. 20.

**534.** If the original successor survived and retained the property until it fell into possession, and all things remained as they were when the succession was created, no question arose; but, although the successor survived, and had done nothing to alter his interest in the property, change might have come from an external source. Thus his estate might have been superseded by the coming into operation of some paramount right, or the exercise of a power of appointment. In such a case the liability to duty determined, as the succession never came into enjoyment.

**535.** Suppose a joint tenancy created in A. and B. had given rise to a succession, A. and B. paid duty each in respect of his interest in possession; that is, an interest in a moiety of the property during the joint lives of A. and B. If during the joint lives there was a severance of the joint tenancy, no further duty was payable by either A. or B. If, however, there was no severance, and A. died first, so that the whole property survived to B., he took a succession in the whole property from the original settlor as predecessor; but, if the joint tenancy when created did not give rise to a succession, then if there was no severance the survivor took the property as a succession from the deceased joint tenant as predecessor.

See 16 & 17 Vict. c. 51, s. 3.

**536.** The successor to the property might assign the succession to some other person by way of gift, so that no new or separate succession was created by the transfer. The duty then became payable by the assignee at the time and rate at which it would have been payable if no assignment had been made. Thus property settled by X. on A. for life, remainder to B., and B. transferred his succession to C., on the death of A., C. became liable to duty at the rate determined by B.'s relationship to X. But suppose property settled on A. for the life of B., remainder to B., here B. had no succession, because he could not take one on his own death; but if he



assigned to C., he conferred on C. an interest to take effect on his (B.'s) death, and thereby created a succession.

See *Att.-Gen. v. Gardner*, 1 H. & C. 639.

**537.** Again, suppose B. settled property on A. for life, remainder to B., B. was the predecessor, and no claim to duty could arise on his disposition in his own favour; but if B. assigned his reversion to C., C. took a succession from B., and became liable to duty.

Assign-  
ment of re-  
version.

**538.** An expectant successor might sell his succession. In this case duty became payable by the purchaser at the time and rate at which it would have been payable if no sale had taken place. An expectant successor might assign his succession so as to create a new succession. Thus, suppose X., having settled real estate on A. for life, remainder to B., and B. assigned his reversion to trustees in trust for himself for life, remainder to his children, and died in the lifetime of A. On A.'s death B.'s children came into possession and paid duty on the succession from their father, created by his assignment of his reversion.

Sale by ex-  
pectant  
successor.

**539.** No duty was payable in respect of B.'s expectant succession, because that duty would only begin to be payable after B. had been in possession of the property, and, as this never happened, B.'s succession had no taxable value. In a similar case, if the property were personal estate on the children taking possession, one duty only would be payable, but at the highest rate.

Death of  
expectant  
successor.

**540.** If the expectant successor died, the result was the same whether he died testate or intestate, one duty only was chargeable, and that at the highest rate which was applicable.

16 & 17 Vict. c. 51, s. 20.

Succession  
duty per-  
sonal debt  
to Crown.

**541.** Succession duty was a personal debt due to the Crown from the successor. All trustees, guardians, committees, tutors or curators in whom any property sub-

ject to duty or the management of it was vested, were similarly liable. Lastly, all persons claiming by alienation or other derivative title, in whom property subject to duty was vested at the time the succession became an interest in possession, were personally liable for the duty.

15 & 16 Vict. c. 51, s. 44.

**542.** Succession duty was a first charge on all property comprised in the succession, but when property was sold under a power of sale which required the proceeds to be settled in the same manner as the original property, the claim and charge for succession duty was shifted from the property sold to the proceeds of sale and to the substituted property when purchased.

15 & 16 Vict. c. 51, s. 41.

**543.** Succession duty consisted of a percentage, varying according to the relationship between the decessor and successor, upon the value of the succession, i.e., the property or interest of the successor.

**544.** In England, by the Finance Act of 1894, a new duty was established called Estate Duty. This duty, though based on probate duty, also effects and has something in common with legacy duty and succession duty. It superseded probate duty, while it left legacy duty practically untouched. It altered succession duty by charging it according to the principal value of real property, which the person succeeding is able to dispose of as he pleases. What it taxes is not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death. It is leviable in respect of all property, both real and personal, of which the deceased could dispose, or in which the interest shifted by reason of his death.

57 & 58 Vict. c. 30.

**545.** In the case of a person domiciled in England his personal property, wherever situate, is made subject

K.E.A.—13

personal  
property  
wherever  
situate.

to duty, thus adopting the principle of *mobilia sequuntur personam*, from legacy duty, and departing from the principle which governs probate duty, namely, that the property taxed must be within the jurisdiction of the Court granting the probate. Real and leasehold property situate abroad are not considered a subject for taxation.

Where de-  
ceased dies  
abroad.

**546.** Where the deceased dies abroad estate duty will be leviable on all his property, whether personal or real, situate in England.

**547.** The property taxed by the Finance Act falls into two main divisions—property of which the deceased was competent to dispose, and property over which he had no power of disposition.

(1) The property of which the deceased was competent to dispose. Such property includes:

(a) His free realty or free personality. This sort of property presents no difficulty. It makes no difference to whom the property is left, or whether the deceased died testate or intestate. The values of his property are added together, and the only effect of the difference in their nature is as to the manner in which the duty is payable.

**548.** The words "competent to dispose" are defined as follows (sec. 22; 2a, 2c, of 57 & 58 Vict. c. 30, Imperial Finance Act).

"Compe-  
tent to dis-  
pose" de-  
fined.

A person shall be deemed competent to dispose of property if he has such an estate or interest therein, or such general power as would, if he were *sui juris*, enable him to dispose of the property, including a tenant in tail, whether in possession or not; and the expression "general power," includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument *inter vivos* or by will, or both, but ~~exclusive~~ of any power exercisable in a fiduciary capacity under a disposition not made by himself, or exercisable as tenant for life under the Settled Land Act, 1882, or as mortgagee. (2a).

Money which a person has a general power to charge on property shall be deemed to be property of which he has power to dispose. (2c).

These sub-sections by sec. 11 of chapter 9 Ontario Acts of 1899 are adopted as clause *g* of sub-section 1 of section 4 of The Ontario Succession Duty Act, R. S. O. 1897, c. 24. Definition adopted by Ontario Act, 1899.

**549.** (b) Property, whether real or personal, belonging to the deceased, which he has for the purpose of duty ineffectually parted with during his life. The object of the section dealing with this matter is to prevent evasions. The account duty above mentioned was imposed to achieve the same object; but this duty is now abolished, the estate duty taking its place. Property ineffectually parted with by deceased.

**550.** Estate duty is now payable in all cases in which account duty would formerly have been payable, and on real property as well as personal; the sections of the account duty act being extended to cover real property as well as personal, and omitting any reference to "voluntary" transactions. Estate duty now payable in all cases where account duty payable.

These cases are therefore defined as follows:

(a) Any property taken as a donatio mortis causa made by any person dying after the first day of August one thousand eight hundred and ninety-four or taken under a disposition, made by any person so dying, purporting to operate as an immediate gift inter vivos, whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been bona fide made twelve months before the death of the deceased, or property taken under any gift, whenever made, of which bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise. Clauses adopted by Ont. Act, 1897.

(b) Any property which a person dying after such day having been absolutely entitled thereto, has caused or may cause to be transferred to or vested in himself and any other person jointly, whether by disposition or otherwise, including any purchase or investment effected by the person who was absolutely entitled to the property either by himself alone, or in concert, or by arrangement with any other person, so that the beneficial interest therein or in some part thereof passes or accrues by survivorship on his death to such other person.

(c) Any property passing under any past or future settlement (including any trust, whether expressed in writing or otherwise), made by any person dying after such day by deed or any other instrument not taking effect as a will, whereby an interest in such property, or the proceeds of sale thereof, for life or any other period determinable by reference to death, is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property or the proceeds of sale thereof.

The charge under the said section shall extend to money received under a policy of assurance, effected by any person dying after the first day of August, 1894, on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit.

(d) Any annuity or other interest purchased or provided by the deceased, either by himself alone, or in concert, or by arrangement with any other person to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.

**551.** It will be seen that sub-sections (c), (d), (e) and (f) of R. S. O. 1897, c. 24, The Succession Duty Act are copied from above clauses of the Imperial Act. These clauses were, as before stated, originally contained in section 38 (2) of the Imperial Customs and Inland Revenue Act of 1881 (44 Vict. c. 12), defining the property to be included by an executor in his account as amended by section 11 of the Imperial Customs and Inland Revenue Act, 1889 (52 Vict. c. 7).

. See post paragraphs, 571-573.

Settled  
property.

**552.** (2) Property over which the deceased had no power of disposition. Such property was of a kind with which probate duty had no concern, viz., settled property. The scheme of the Act is to tax not the interest which has ceased but the property out of which the interest was enjoyed: thus A. has a life interest in £10,000, estate duty is payable on his death, not according to the value of the life interest he has enjoyed, but on £10,000. It would be unfair that A.'s estate in such a case should pay the duty on the full value of the property in which

he only had a partial interest. Consequently, the duty, is made payable out of the property itself, in which fresh interests have in the meantime arisen. It is not easy to adjust taxation on the one person's interest out of another person's estate—the successor, in fact, paying for the predecessor. But although the Act taxes property in which the deceased or any other person had an interest ceasing on the death of the deceased to the extent to which a benefit accrues or arises by the cesser of such interest, the latter would only show the area of taxation. This area is limited to the property covered by that interest. If the interest was an interest in the income of the whole property, the whole capital value is charged with duty. If it was an interest in part, only so much of the capital as produced that part is taxed. The interest to which the successor succeeded by the death is immaterial, the only question is in what amount of property did an interest cease.

57 & 58 Vict. c. 30, s. 7 (7).

**553.** The interest which ceased need not have been an interest which the deceased had in the property; thus property is settled on A. during the life of B., and then over. Estate duty is payable on B.'s death in respect of the cesser of that interest. This does not prejudice B., for the duty is not paid out of his estate, but out of the property, nor is the property aggregated so as to affect the rate of duty payable on his estate. The interest that ceased on death may only have ceased in the sense of having altered its nature. If so, it makes no difference and estate duty is payable on the principal value of the property.

**554.** The change of interest to be taxable with estate duty must take place on death. If a life interest is given, for instance, to a woman during widowhood, and she marries again, no estate duty is payable on that devolution. So, too, it only attaches to property existing at the death. This is one of the points which show how estate duty differs from succession duty. Succession

duty, dealing as it did with successions, had to provide, and did provide, for successions taken by anticipation. Estate duty, being of the nature of a probate duty, is only concerned with what passes at the death. With previous transactions, in so far as they are genuine, it has nothing to do. Consequently, in the case of settlements, the only question is what is the property comprised in the settlement at the date of the death. For instance, property settled on A. for life, then B. for life, then for their children as they jointly appoint. A. and B. appoint part of the trust fund to a child, and at the same time release their life interests, so that the part so appointed is paid out at once to the child. No estate duty is payable on the death of A. in respect of the trust funds so taken out of settlement.

Estate  
duty not  
payable on  
every dev-  
olution.

**555.** Estate duty is not payable on every devolution of settled property. One payment frees it until the death of some person who has been able to dispose of the property as he pleased. Thus, A., by will, settles property on B. for life, then on C. for life, then on D. in tail. Estate duty is payable on A.'s death, and will not again be payable until the death of D.; but duty will be payable on D.'s death, notwithstanding D. may have disentailed and resettled the estate before his own death. So if a person dies prior to his interest in settled property coming into possession, no duty is payable on his death, provided that subsequent limitations under the settlement continue to exist.

57 & 58 Vict. c. 30, s. 5 (2).

Property  
in joint  
names of  
deceased  
and some  
other per-  
son.

**556.** Another kind of property of which the deceased could not dispose, and which is liable to estate duty, is property belonging to him which he has placed in the joint names of himself and some other person. For instance, A. transfers £500 stock into the joint names of himself and his wife, and dies in his wife's lifetime. Estate duty is payable notwithstanding, on his death, on the value of the stock.

57 & 58 Vict. c. 30, s. 21 (5).

**557.** The value in respect of which the estate duty is levied is in nearly every case the principal value of the property in which an interest passes. This is so whether the interest is absolute or limited; thus the deceased leaves a freehold estate, to which he was entitled in fee, and was also entitled to a life interest in another freehold estate and in certain personal property; estate duty is payable on the principal value of the real and personal estate, in which he had only a life interest, in exactly the same way as on the principal value of the estate of which he was the owner in fee simple.

Value on which estate duty is levied.

**558.** When the deceased enjoyed the income of property, that property is taxable according to its principal value. If he had only an interest in part of the income, the principal value of the whole property is apportioned according to the income it is actually producing. For example, if the deceased had a rent charge of £200 issuing out of property, the principal value of which is £20,000, producing an annual income of £800, the principal and taxable value of that rent charge is £5,000.

When deceased enjoys income now taxed.

**559.** In the case of reversionary interests of the deceased, if the duty is paid at once, the value for estate duty is the selling value of that interest at the time of the death. The principal value of any property is taken to be its market value.

Reversionary interests.

57 & 58 Vict. c. 30, s. 7 (6).

**560.** The principal value having been arrived at certain deductions are allowed in calculating the duty.

Deductions allowed.

(1) Reasonable funeral expenses.

(2) As to personal property abroad which is taxable in England by additional expense in administering it or realizing it by reason of the property being abroad, up to five per cent. may be allowed and duty paid in a foreign country may be deducted from the value of the property.

Mode of ascertaining rate of taxation.



(3) Debts and incumbrances whether payable out of the general personal estate or charged on specific property, are allowed with this exception, that if incurred or created by the deceased, they must have been for full consideration in money or money's worth, wholly for the benefit of the deceased, and taking effect out of his interest. Thus, if the deceased on his daughter's marriage has covenanted to pay, or has charged his property with a certain sum of money, that sum, if owing at his death, cannot be deducted as a debt or an incumbrance.

(4) So, too, debts owing by the deceased to persons resident abroad, unless they are charged on property in England, or are to be paid in England, must be deducted in the first instance from the deceased's personal estate abroad, if he has any.

57 & 58 Vict. c. 30, s. 7.

Aggregation.

**561.** The value of the personal estate of the deceased, of his real estate, and of any property of which he was not able to dispose, but which passes on his death, in fact, of each subject of property is taken separately, so that the duty may be adjusted according to the nature of the subject of property payable by different persons, and borne in different ways. But for the purpose of ascertaining the rate at which estate duty is payable on each subject of property, the principal value of the different subjects of property is added together.\*

57 & 58 Vict. c. 30, s. 4.

When duty may be paid.

**562.** In the case of reversionary interests of the deceased, duty may be paid at the option of the person accountable, either with the duty in respect of the rest of the estate, or when the interest falls into possession. If

\* Thus suppose the deceased had a life interest on 10,000*l.*, a general power of appointment over 40,000*l.*, a freehold estate for 20,000*l.*, and free personalty extending to 5,000*l.*; the rate at which estate duty will be payable on each of these subjects of property is determined by their aggregate value namely, 75,000*l.*; so that the general rate will be 5% on each of these sums, although if there were no such aggregation the rate of duty would be considerably less.

This principle is called aggregation and was new in the Finance Act of 1894.

the duty is not paid at the death, the value of the reversionary interest is taken for aggregation purposes, i.e., for determining the rate of duty on the rest of the estate at its then present value, then when the interest falls into possession the duty is paid according to its value at that date, and the rate is determined by adding the value of the rest of the estate as ascertained.

57 & 58 Vict. c. 30, s. 7 (6).

**563.** It is only property in respect of which estate duty is leviable that is aggregated; so that any property free from duty is also free from aggregation. There are some exceptions to aggregation which need not be repeated here. I have thought it well to mention this feature of the Imperial succession duty as our system is one of calculation of the aggregate value, not varying with a particular species of property.

**564.** The person to pay the duty varies according to the nature of the property. The duty in respect of all personal property, whether situate abroad or in England, of which the deceased could dispose, must be paid by his legal personal representative, who may also pay the duty on any property which by the will is under his control, or which the persons accountable for duty ask him to pay.

57 & 58 Vict. c. 30, s. 6 (2).

**565.** As to the duty on the personal estate which he must pay, and for which he is accountable, the duty is payable as in probate duty, out of the residuary personal estate. Where the personal estate is locally situate abroad, and therefore does not pass to the legal personal representative as such, the duty is recoverable from the trustees or other persons into whose hands it comes. As to personal estate of which the deceased could dispose by virtue of a general power, if he exercised the power and appointed an executor, so that the executor would be entitled to receive the fund, the duty would be paid out of the residuary personal estate. If the deceased did

not exercise the power, and the property passed to some other person, although the executor would have to pay the duty out of the residuary personal estate, he could recover it from the trustees or owners of the property so passing.

57 & 58 Vict. c. 30, ss. 8 (3), 9 (5).

From  
what  
funds exe-  
cutor may  
pay duty.

**566.** With regard to property which is under the control of the executor by virtue of the will, he may pay the duty at once out of the residuary personal estate, and the same as to other property not under his control, but the duty on which the persons accountable ask him to pay; in both cases, however, the duty so paid is recoverable against the property itself, the payment out of the residue being only by way of convenience. In cases in which the legal personal representative is not accountable for the duty, the property itself bears its own duty, and the only burden which the taxation of property of which the deceased could not dispose, imposes on his own free property is that there may be an increase of the rate of duty on the latter property owing to the principal of aggregation. The manner in which the duty is raised is either by sale or mortgage, or a terminable charge on the property, and the person to so raise it is the accountable person whether he has an interest in the property or not.

57 & 58 Vict. c. 30, s. 9 (5).

**567.** The duty is collected by stamps and Commissioners of Inland Revenue are appointed to manage the duty.

Liability  
for duty to  
what prop-  
erty at-  
tached.

**568.** The liability for the duty attaches to the legal personal representative as to all personal property of which the deceased was competent to dispose; as to all other property, to the person accountable. A bona fide purchaser for valuable consideration without notice is in no case liable to or accountable for estate duty. In addition to this personal liability, where property does not pass to the executor,

a rateable part of the estate duty is charged on the property in respect to which it is payable. The duty remains charged until a certificate of the discharge has been obtained, or in the case of purchasers for value or mortgagees six years have elapsed from the date of notice, or two years from the time for the payment of the last instalment of the duty, or in the absence of notice, twelve years from the event which gave rise to a claim.

57 & 58 Vict. c. 30, s. 8.

**569** Settlement estate duty is an extra duty of <sup>Settle-</sup>ment <sup>ment es-</sup>estate duty, 1 per cent. imposed on settled property, that is, property for the time being limited to or in trust for any persons by way of succession.

**570.** The area of taxation is the actual or net <sup>Area of</sup>amount of the settled property, and the duty is paid in <sup>taxation.</sup>the same manner and at the same time as the rest of the estate duty.

57 & 58 Vict. c. 30, s. 22.

**571.** The above sketch of the English Act, upon <sup>Scheme of</sup>which our system is founded, will now enable us to under <sup>Ontario</sup>stand the scope of our Act. This Act is printed in full as <sup>Act.</sup>an appendix, but some parts of it must be repeated here. The following sections state what property in Ontario is subject to succession duty. R. S. O. 1897, c. 24, The Succession Duty Act.

4. (1) Save as aforesaid, the following property\* shall be subject <sup>Property</sup>to a succession duty as hereinafter provided, to be paid for the use of <sup>liable to</sup>the Province over and above the fees payable under <sup>succession</sup>The Surrogate <sup>duty. Rev.</sup>Courts Act. <sup>Stat. c. 59.</sup>

(a) All property situate within this Province, and any interest <sup>Property</sup>therein or income therefrom, whether the deceased person owning or <sup>situate in</sup>entitled thereto was domiciled in Ontario at the time of his death or <sup>Province.</sup>was domiciled elsewhere, passing either by will or intestacy.

\*The word "property" in this Act includes real and personal "Prop-erty of every description, and every estate or interest therein" capable of being devised or bequeathed by will or of passing on the meaning death of the owner to his heirs or personal representatives. Sec. 2 of. of Act. The exceptions are stated below, paragraph 572.

Property  
voluntar-  
ily trans-  
ferred in  
contem-  
plation of  
death.

(b) All property situate as aforesaid or any interest therein or income therefrom, which shall be voluntarily transferred by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, bargainor, vendor or donor, or made or intended to take effect, in possession or enjoyment after such death, to any person in trust or otherwise, or by reason whereof any person shall become beneficially entitled in possession or expectancy to any property, or the income thereof.

*Dona-  
tionis mor-  
tis causa* or  
voluntary  
disposition  
made  
within six  
months be-  
fore death,  
etc.

(c) Any property taken as a donatio mortis causa made by any person dying on or after the 7th day of April, 1896, or taken under a disposition made by any person so dying, purporting to operate as an immediate gift inter vivos, whether by way of transfer, delivery, declaration of trust, or otherwise, which shall not have been bona fide made twelve months before the death of the decedent, including property taken under any gift, whenever made, of which property bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise.

Property  
transfere-  
d by  
owner to  
himself  
jointly  
with some  
other per-  
son.

(d) Any property which a person dying on or after the 7th day of April, 1896, having been absolutely entitled thereto, has caused, or may cause to be transferred to, or vested in himself, and any other person jointly, whether by disposition or otherwise, so that the beneficial interest therein, or in some part thereof, passes or accrues by survivorship on his death to such other person, including also any purchase or investment effected by the person who was absolutely entitled to the property either by himself alone or in concert, or by arrangement with any other person.

Property  
passing  
under  
settlement

(e) Any property passing under any past or future settlement, including any trust, whether expressed in writing or otherwise, and if contained in a deed or other instrument effecting the settlement, whether such deed or other instrument was made for valuable consideration or not as between the settlor, and any other person, made by any person dying on or after the 7th day of April, 1896, by deed or other instrument not taking effect as a will, whereby an interest in such property or the proceeds of sale thereof for life, or any other period, determinable by reference to death, is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right by the exercise of any power to restore to himself or to reclaim the absolute interest in such property or the proceeds of sale thereof, or to otherwise resettle the same or any part thereof.

Annuities,  
etc.

(f) Any annuity or other interest purchased or provided by any person dying on or after the 7th day of April, 1896, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.

(2) The descriptions of properties in clauses (c), (d), (e) and (f), Particular shall not be construed to restrict the generality of the descriptions description contained in clauses (a) and (b), and subject to the provisions of sub- tion of section 8 of this section, the expressions "all property" and "any property" in this section shall be restricted to property situate within liable not to affect general words. this Province.

(8) Provided also that any portion of the estate of any deceased person, whether at the time of his death such person was domiciled in the Province of Ontario or was domiciled elsewhere, which is brought into the Province by the executors or administrators of the estate to be administered or distributed in this Province, shall be liable to the duty hereinbefore imposed but if any succession or legacy duty or tax has been paid upon such property elsewhere than in Ontario, and such duty or tax is equal to or greater than the duty payable on property in this Province, no duty shall be payable thereon in this Province; and if the duty or tax so paid elsewhere is less than the duty payable on property in this Province, then the property upon which such duty or tax has been paid elsewhere shall be subject to the payment of such portion only of the succession duty provided for in the preceding sub-sections of this section as will equal the difference between the duties payable under this Act with respect to property in the Province of Ontario and the duty or tax so paid elsewhere. Ont. Stats. 1896, c. 5, s. 1, part.

### 572. The exceptions to the Act are:

When Act shall not apply.

(1) Any estate the value of which, after payment of all debts and expenses of administration, does not exceed \$10,000.

(2) Property given, devised or bequeathed for religious, charitable or educational purposes.

(3) Property passing under a will, intestacy or otherwise, to or for the use of the father, mother, husband, wife, child, grand-child, daughter-in-law or son-in-law of the deceased, where the aggregate value of the property of the deceased does not exceed \$100,000 in value. Ont. Stats. 1892, c. 6, s. 3.

573. A comparison of the above sections with the Sections of the Imperial Act above quoted, paragraph 550, will show that they are the same. The duties payable are set out in sub-sections 3, 4, 5, 6 and 7 of section 4 of the Act adopted by Ontario.

It must be borne in mind that hereafter in determining for the purposes of sub-sections 3 to 6 of section 4, the aggregate value of the property of any person dying after 1st April, 1899, the value of his property situate

Property outside of this Province, must be included as well as the value of the property situate within this Province.

Property situate outside of Ontario must be included.

Ont. Stats. 1899, c. 9, s. 12.

#### 574. As to future estates:

When duty payable on future estates or interests.

Where there is a devise, descent or bequest of property liable to succession duty to take effect in possession or to come into actual enjoyment after the expiration of a life estate, or a term of years, the duty on such estate or interest is not payable, nor does it begin to run until the person or persons liable come into actual possession by determination of the prior estate, and the duty must be assessed upon the value of the estate or interest at the time when the right of possession accrues. If no person is entitled to the actual enjoyment of the property or the income, or where there is some part of the property or income to the present enjoyment of which no person is entitled the duty is payable at the death of the deceased or within eighteen months thereafter.

R. S. O. 1897, c. 24, s. 11

Commuted duties on future estates or interest.

**575.** The duty payable in respect of a future estate or interest may be commuted for a present payment, a present value being set upon such duty, regard being had to the contingencies affecting the liability to and rate and amount of the duty and interest.

R. S. O. 1897, c. 24, s. 11 (3).

When duties on annuities to be paid

**576.** A duty chargeable upon any legacy given by way of annuity for life or otherwise is payable by four equal payments, the first of which must be made before or in completing payment of the first year's annuity, and three others shall be made before or on completing the respective payments of the three successive years' annuities respectively. If the annuitant dies before the expiration of the four years only payment of instalments which fell due before his death are required.

R. S. O. 1897, c. 24, s. 11 (4).

**577.** In such a case as between the executor or administrator and the person who is to become entitled, the duty payable by the executor or administrator shall be a charge on the future estate or interest, and must be paid by that person with interest at the time the estate or interest came into actual possession unless the person is desirous to pay the duty at an earlier date.

Further time may be granted.

R. S. O. 1897, c. 24, s. 11 (5).

**578.** On an application for letters probate or administration, the applicant must file under oath an itemized inventory of all the property of the deceased person and its market value, and a statement showing the several persons to whom the property will pass under the will or intestacy and degree of relationship in which they extend to the deceased.

Executors to file inventory and bonds for payment of duty.

R. S. O. 1897, c. 24, s. 5.

**579.** The applicant must also deliver to the Surrogate Registrar a bond in a penal sum equal to 10 per cent. of the sworn value of the property liable to Succession duty executed by himself and two sureties. If the Treasurer of the Province is not satisfied as to the value sworn to or with the correctness of the inventory, the Surrogate Registrar shall, at the instance of the Provincial Treasurer, direct the sheriff of the county to make a valuation of the appraised property as stated in the inventory or omitted from it. The sheriff must then give written notice to the persons interested of the time and place that the appraisement will be made. The appraisement must then be made of the property at its fair market value and a report must be made by the sheriff in writing to the Surrogate Registrar, and the report must be filed in his office. Where the parties do not agree on the valuation, the Surrogate Registrar must assess and fix the cash value at the date of the death of the deceased of all estates, interests, annuities and life estates or terms of years growing out of such estate, and the duty to which they are liable. The value of future or contingent

Appraisement, valuation of property and mode of assessing.



or limited estates, incomes or interests in respect of which the duty is payable is determined by the rule, method and standards of mortality and of value which are employed by the Provincial Inspector of Insurance in ascertaining the value of policies of life insurance and life annuities for the determination of the liabilities of life insurance companies, except that the rate of interest to be taken for the purpose of computing the present value of all future interests and contingencies is four per cent. per annum.

R. S. O. 1897, c. 24, ss. 5-8, as amended by Ont. Stats. 1899, c. 9, s. 14.

**580.** When this appraisalment is made the Surrogate Registrar must notify the result to the parties interested having for the purpose of the Act the power to appoint a guardian for infants who have no guardian.

Appeal  
from  
appraisal-  
ment of  
assess-  
ment.

**581.** Any person dissatisfied with the appraisalment or assessment has the right of appeal within thirty days to the Surrogate Judge of the county. The Judge has jurisdiction to determine all questions of valuation and of the liability of the appraised estate or any part thereof for such duty and his decision is final unless the property in respect of which such appeal is made shall exceed in value \$10,000. In this last case, a further appeal lies to the High Court, and from the High Court to the Court of Appeal, whose decision is final.

R. S. O. 1897, c. 24, s. 9.

Duties to  
be paid  
within 18  
months  
from death  
of owner.

**582.** The duties imposed by the Act are due and payable at the death of the deceased or within eighteen months afterwards. If they are paid within eighteen months no interest is charged, but if not paid interest at the rate of six per cent. per annum is charged, and the duties with the interest are a lien upon the property in respect to which they are payable.

R. S. O. 1897, c. 24, s. 12.

**583.** Sections 8, 9, and 10 of chapter 9 of the Ontario Statutes of 1899 provide as follows:

8. Where any property which has, previous to the death of a person whose estate is subject to duty, been conveyed or transferred to some other person is declared liable to duty the Court may declare the duty to be a lien upon the property, and may make such declaration although the amount of such duty has not been ascertained, and where any property which, had it remained in the hands of the person to whom or for whose benefit it was conveyed or transferred by such deceased person, would have been liable to duty, has been conveyed or transferred to any purchaser for valuable consideration, the Court may direct the person to whom or for whose benefit the said property was conveyed or transferred by such deceased person, as aforesaid, to pay the amount of the duty to which such property would have been subject as aforesaid.

Declaration as to liability of property transferred before death.

9. In case it is claimed that any land or money secured by any mortgage or charge upon land is subject to duty, the Provincial Treasurer or the Solicitor to the Treasury, acting in his behalf, may, when deemed necessary, cause to be registered in the proper registry office, or if the land is registered under The Lands Titles Act, in the proper office of land titles, a caution, stating that succession duty is claimed by the Provincial Treasurer in respect of the said land, mortgage, or charge on account of the death of the deceased, naming him, and any subsequent dealing with such land, mortgage or charge, shall be subject to the lien for such duty, but nothing herein contained shall affect the rights of the Crown to claim a lien independently of the said caution.

Registration of caution R. S. O. 138.

10. The preceding sections shall apply to the estates of all persons in respect of which the duty is claimed, whether such persons have died before or shall die after the passing of this Act.

Retrospective operation of preceding provision.

**584.** Section 13 of the same Act also provides as follows:

13. No foreign executor or administrator shall assign or transfer any stocks or shares in this Province standing in the name of a deceased person, or in trust for him, which are liable to pay succession duty until such duty is paid to the Treasurer of the Province, or security given as required by section 5 of the said Act, and any corporation allowing a transfer of any stocks or shares contrary to this section shall be liable to pay the duty payable in respect thereof.

Foreign executors not to transfer stocks until duty paid.

Caution intended to protect Crown.

**585.** Sections 8, 9, 10 and 13 on pag. 209 are intended to protect the rights of the Crown. They are certainly stringent, and it remains to be seen whether the closing words of section 10 may not cause injustice in the case of an innocent purchaser for value.

Requests to executors or trustees.

**586.** If a bequest or devise of property otherwise liable to payment of duty is made to an executor or trustee in lieu of commission or allowance, and the bequest or devise exceeds what would be a reasonable compensation for the services of the executor, such excess shall be liable to such duty, and the Judge of the Surrogate Court must fix the compensation.

R. S. O. 1897, c. 24, s. 1.

Administrators, etc., to deduct duty before delivering property.

**587.** An executor or administrator must deduct the duty or collect it upon the appraised valuation from the person entitled to the property, and he must not deliver any property subject to duty until he has collected it.

R. S. O. 1897, c. 24, s. 14.

Refund duty upon subsequent payment of debts.

**588.** Where any debts are proved against the estate of a deceased person after the payment of legacies or distribution of property from which the duty has been deducted, or upon which it has been paid, and a refund is made by the legatee, devisee, heir or next of kin, a proportion of the duty paid must be re-paid to him by the executor or by the Provincial Treasurer.

R. S. O. 1897, c. 24, s. 17.

**589.** Executors or administrators have power to sell so much of the property of the deceased as will enable them to pay the duty in the same manner as they have by law for the payment of debts.

R. S. O. 1897, c. 24, s. 15.

Further time may be granted.

**590.** The Surrogate Judge may extend the time for payment of the duty where it appears that payment within the time prescribed by the Act is impossible owing to some cause over which the person has no control.

R. S. O. 1897, c. 24, s. 11 (5).

**591.** By the before mentioned chapter 9 of the Ontario Acts of 1899, provisions are made for the recovery of succession duties as debts due to the Crown. The Act is printed in the appendix, and further reference here to these provisions is unnecessary.

#### 8. PAYMENT OF DEBTS.

**592.** Before any debt or duty whatsoever funeral expenses, with the proper limitation as to amount, are to be allowed out of the estate of the deceased.

The next thing to justify and occasion expense is the proving of the will or taking out of administration.

**593.** The third occasion of disbursement by the executor or administrator is the payment of debts, and in such payment he must be careful to observe the rules of priority, for if he pay those of a lower degree first he must on a deficiency of assets answer those of a higher out of his own estate.

2 Black. Comm. 511.

**594.** In Ontario as appears from the following section of R. S. O. 1897, c. 129, The Trustee Act, all debts are payable *pari passu*.

34. On the administration of the estate of a deceased person, in case of a deficiency of assets, debts due to the Crown and to the executor or administrator of the deceased person, and debts to others, including therein respectively debts by judgment or order and debts of record, debts by specialty, simple contract debts, and such claims for damages as by statute are payable in like order of administration as simple contract debts, shall be paid *pari passu*, and without any preference or priority of debts of one rank or nature over those of another; but nothing herein contained shall prejudice any lien existing during the lifetime of the debtor on any of his real or personal estate. R. S. O. 1897, c. 129, s. 34 (s. 32, R. S. O. 1887, c. 110).

Administration *pari passu*.

*Chamberlain v. Clark*, 1 O. R. 135. (See paragraph 614).

In the administration of the Ontario estate of a deceased domiciled abroad, foreign creditors are entitled to dividends *pari passu* with Ontario creditors.

*Re Kloebe*, 28 Ch. D. 175, followed. *Milne v. Moore*, 24 O. R. 456.

**595.** A discretion is allowed executors and administrators as to settling debts due the estate.

Powers of  
executors  
as to set-  
tling debts  
accepting  
from or  
to their  
estates.

33. (1) It shall be lawful for any executors to pay any debts or claims upon any evidence that they may think sufficient, and to accept any composition or any security, real or personal, for any debts due to the deceased, and to allow any time for payment of any such debts as they may think fit, and also to compromise, compound or submit to arbitration all debts, accounts, claims and things whatsoever relating to the estate of the deceased, and for any of the purposes aforesaid to enter into, give and execute such agreements, instruments of composition, releases and other things as they may think expedient, without being responsible for any loss occasioned thereby.

(2) None of the powers in this section conferred shall take effect or be exercisable by virtue of this Act by any trustees or executors if it is expressly declared in the deed, will, or other instrument creating such trustees or executors, that such trustees or executors shall not have such power.

(3) This section shall apply and extend to both present and future trustees and executors. R. S. O. 1897, c. 129, s. 33 (s. 31, R. S. O. 1887, c. 110).

Executor  
paying  
statute-  
barred  
debt.

**596.** Though as a general rule an executor may pay a statute-barred debt, he may not pay such a debt when it has been judicially declared to be statute-barred. Whether an executor may pay a statute-barred debt against the declared wish of his co-executor, *quære*.

**597.** An executor against the wish of his co-executor paid a debt which had been declared on an administration summons, to be statute-barred:—Held, that both he and the payee who had received the money through the wrongful act of her agent, and that agent who had notice of all the facts, were liable to refund.

*Midgley v. Midgley* (1893) 3 Ch. 282.

Payment by administrator under advice.

*Mayhew v. Stone*, 26 S. C. R. 58.

Payment over to wrong person.

*Huggins v. Law*, 11 O. R. 565.

Paying a claim which should have been doubtful.

*Re Williams*, 27 O. R. 405.

Deficiency of assets, over-payment of one creditor.

*Chamberlain v. Clark*, 9 A. R. 273.

**598.** The mere circumstance of want of notice of a debt or claim against the estate of the deceased, will not excuse an executor or administrator from the payment or satisfaction of it if the assets were originally sufficient for the purpose, notwithstanding that in ignorance of the existence of the debt or claim he has bona fide handed over the assets to legatees or parties entitled in distribution; but lapse of time may operate as a waiver of the right of a creditor or claimant by way of laches on his part so as to preclude him from the claiming of the insufficiency of the assets. And now by the Ontario Statute (R. S. O. 1897, c. 129, The Trustee Act).

38. "Where a trustee or assignee, acting under the trusts of a deed or assignment for the benefit of creditors generally, or a particular class or classes of creditors, where the creditors are not designated by name therein, or an executor or an administrator has given such or the like notices as in the opinion of the Court in which such trustee, assignee, executor or administrator is sought to be charged, would have been given by the High Court in an action for the execution of the trusts of such deed or assignment, or an administration suit, as the case may be, for creditors and others to send in to such trustee, assignee, executor or administrator, their claims against the person for the benefit of the creditors of whom such deed or assignment is made, or the estate of the testator or intestate, as the case may be, the trustee, assignee, executor or administrator shall, at the expiration of the time named in the said notices, or the last of the said notices, for sending in such claims, be at liberty to distribute the proceeds of the trust estate or the assets of the testator, or intestate, as the case may be, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which the trustee, assignee, executor or administrator, has then notice, and shall not be liable for the proceeds of the trust estate or assets, as the case may be, or any part thereof so distributed to any person of whose claim the trustee, assignee, executor or administrator, had not notice at the time of the distribution thereof, or a part thereof, as the case may be; but nothing in this Act contained shall prejudice the right of any creditor or claimant to follow the proceeds of the trust estate or assets, as the case may be, or any part thereof into the hands of the person or persons who may have received the same respectively. R. S. O. 1897, c. 129, s. 38 (s. 36, R. S. O. 1887, c. 110).

**599.** A notice by an executor or trustee under section 38 R. S. O. 1897, c. 129, besides calling for claims

Executor  
omitting  
to satisfy  
debt or  
claim.

Distribu-  
tion of  
assets und-  
er trust  
deeds for  
benefit of  
creditors  
or of the  
assets of a  
testator  
after no-  
tice given  
by trustee  
assignee  
executor  
or admin-  
istrator

Requisite  
for notice

against the estate, should state that the effect of non-compliance with it will be the exclusion of persons failing to comply therewith from participation in the estate to be divided, and such notice should be published in localities where claimants on the estate reside, or in the "Ontario Gazette" if their residence is unknown.

**600.** Where the executors of a sole surviving executor of an estate in giving notice for claims under the statute, omitted to give the proper notice for claims against the estate of which their testator had been to their knowledge executor, with which they had never intermeddled and of the existence of claims against which they were unaware, they were held liable to the cestui que trust to whose knowledge the existence of the notice was not shewn to have come, for a fund for which their testator was responsible; and the fact that administration de bonis non of the estate of which their testator had been executor was subsequently granted to another person, did not under the circumstances of this case affect their liability.

*Stewart v. Snyder*, 30 O. R. 110.

Publication in the Ontario Gazette of an advertisement for creditors, pursuant to R. S. O. 1897, c. 129, s. 38, is not necessary to release executors from liability for payments made by them.

*Re Cameron*, 15 P. R. 272.

Overpayment after advertisement, action to recover.

*Leitch v. Molsons Bank*, 27 O. R. 621.

Distribution after statutory advertisement.

*Scott, Equit. Life Co. v. Beatty*, 29 L. R. Ir. 299.

**601.** An executor or administrator may compel a creditor to enforce his claim by action if he takes advantage of the following provision:

If claim is rejected, and notice given an action must be brought within a certain period.

35. In case the executor or administrator gives notice in writing referring to this section, and of his intention to avail himself thereof to any creditor, or other person of whose claims against the estate he has notice, or to the attorney or agent of such creditor or other person, that he, the executor or administrator, rejects or disputes the claim, it shall be the duty of the claimant to commence his action in respect of the claim within six months after the notice is given, in case the debt or some part thereof is due at the time of

the notice, or within six months from the time the debt, or some part thereof, falls due, if no part thereof is due at the time of the notice, and in default the claim shall be forever barred; provided always, that in case the claimant shall be nonsuited at the trial, the claimant or his executors or administrators may commence a new action within a further period of one month from the time of the nonsuit. R. S. O. 1897, c. 129, s. 35 (s. 33, R. S. O. 1887, c. 110).

**602.** With respect to contingent debts and liabilities, a question of great importance arises namely, whether an executor can safely make payment of legacies, or deliver over a residue, where there is an outstanding covenant of his testator (or bond, with a condition, or the like), which has never yet been broken, and which may or may not be broken hereafter. When such liabilities exist an executor is not bound to part with the assets either to a particular or residuary legatee without a sufficient indemnity, or without impounding a sufficient part of the residuary estate for that purpose. For otherwise if the contingent covenant, etc., should afterwards be broken, the executor would be liable to answer the damages *de bonis propriis* without any fault in him.

Wms. p. 1204.

**603.** As to contingent liabilities on covenants in leases an executor may proceed as follows:

36. Where an executor or administrator, liable as such to the tenants, covenants or agreements contained in any lease or agreement for a lease granted or assigned to the testator or intestate, whose estate is being administered, has satisfied all such liabilities under the said lease or agreement for a lease as have accrued due and been claimed up to the time of the assignment hereinafter mentioned, and has set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum, covenanted or agreed by the lessee to be laid out on the property demised or agreed to be demised, although the period for laying out the same may not have arrived, and has assigned the lease or agreement for the lease to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and among the parties entitled thereto respectively, without appropriating any part or any further part (as the case may be) of the personal estate of the deceased to meet any future liability under the

Contingent debts and liabilities.

As to liability of executor or administrator in respect to covenants, etc., in leases. Imp. Act 22-23, V. c. 35 s. 27.



said lease or agreement for a lease; and the executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease; but nothing herein contained shall prejudice the right of the lessor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed. R. S. O. 1897, c. 129, s. 36 (s. 34, R. S. O. 1887, c. 110).

As to liability of executor in respect to rents, etc., in convey; ances on rent, charges, etc., Imp. Act 22-23 V. c. 35 s. 38.

37. In like manner where an executor or administrator, liable as such to the rent, covenants or agreements, contained in any conveyance on chief rent or rent-charge (whether any such rent be by limitation of use, grant or reservation), or agreement for such conveyance granted or assigned to or made and entered into with the testator or intestate whose estate is being administered, has satisfied all such liabilities under the said conveyance or agreement for a conveyance as may have accrued due and been claimed up to the time of the conveyance hereinafter mentioned, and has set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee to be laid out on the property conveyed or agreed to be conveyed, although the period for laying out the same may not have arrived, and has conveyed such property or assigned the said agreement for such conveyance as aforesaid to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively without appropriating any part or any further part (as the case may be) of the personal estate of the deceased to meet any future liability under the said conveyance or agreement for a conveyance; and the executor or administrator so distributing the residuary estate shall not, after having made or executed such conveyance or assignment, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said conveyance or agreement for conveyance; but nothing herein contained shall prejudice the right of the grantor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or among whom the said assets may have been distributed. R. S. O. 1897, c. 129, s. 37 (s. 35, R. S. O. 1887, c. 110).

Direction by testator to distribute equally.

604. If a testator directs his executor to make an equal distribution of the assets among all his creditors, such direction must be read subject to the creditors priorities among themselves, if any.

**605.** The only absolutely privileged debts are such <sup>Absolute</sup> debts as are secured by some particular security assigned by <sup>ly privi-</sup> the testator for the better securing such particular debts. <sup>leged debt.</sup>

**606.** It was formerly a privilege of the executor that he had <sup>Right</sup> the right to retain for his own debt due to him from the deceased in preference to all other creditors of equal degree, thus remedying errors from the mere operation of law, on the ground that it would be absurd and incongruous that he should sue himself, or that the same hand should at once pay and receive the debt.

**607.** He could retain not only for debts which he <sup>Right of</sup> claimed beneficially, but also for those to which he was <sup>retainer</sup> entitled as trustee. This right of retainer exists no <sup>by execut-</sup> longer. <sup>or.</sup>

*Willis v. Willis*, 20 Gr. 396; *Re Ross*, 29 Gr. 385.

**608.** An executor is entitled to take the personal <sup>Executor</sup> property at <sup>may pur-</sup> value for a debt due by the estate to him, <sup>chase at</sup> and his purchase at public auction of the testator's per- <sup>public</sup> sonal estate, in lieu of money due him was held valid. <sup>auction</sup>

*Yost v. Crombie*, 8 C. P. 159.

**609.** He may retain a debt barred by the statute. <sup>May re-</sup> Quare, where the personal estate of a testator is exhaust- <sup>tain debt</sup> ed can he retain such a debt out of the proceeds of real <sup>barred by</sup> estate. <sup>statute.</sup>

*Crooks v. Crooks*, 4 Chy. 615.

**610.** Under their father's will two of his sons were <sup>Executor</sup> to receive a share of the proceeds of certain land to be <sup>may im-</sup> sold on the death of his widow, who was still alive. They <sup>pound</sup> also owed the testator a certain debt, which, by the will, <sup>shares to</sup> was to be payable in five yearly instalments from the <sup>pay debt</sup> time of his death. <sup>of persons</sup> entitled.

About two years subsequent thereto the sons made an assignment for the benefit of their creditors under R. S. O. 1897, c. 147.

Held, (1) that the effect of the assignment was by virtue of section 21, sub-section 4, of that Act, to accelerate payment of the debt due to the estate.

(2) That the executors being also trustees of the land of which the sons were to receive shares when sold, under the will, held security for their claim, within the meaning of that Act, having (because of the Devolution of Estates Act) the right to impound the sons' share under the will as against their debt to the estate. This security the executors and trustees should value pursuant to R. S. O. c. 147.

*Tillie v. Springer*, 21 O. R. 585.

What law is to govern in administration of assets.

**611.** If a debtor dies domiciled in Ontario, where debts are payable *pari passu*, and leaves assets in a foreign country, by the law of which some debts are preferred to others, and administration is duly taken out in Ontario, and also in the place of the situs of the foreign assets, what rule is to govern in the administration of the assets? The law of the domicile? Or the law of the situs? It is held (*Wilson v. Lady Dunsany*, 18 Beav. 293), that the personal assets of the testator must be administered on the principle of the law of his domicile. Later authority, (*Carron Iron Co. v. Maclaren*, 5 H. L. 455), seems to favour the law of the situs of the assets this seems a more reasonable view to take.

*Re Kloebe*, 28 Ch. D. 175. Followed in *Milne v. Moore*, 24 O. R. 456. See paragraph 594 ante.

Executor paying debt of an inferior nature.

**612.** If an executor or administrator pays a debt of a lower degree before one of a higher he must, on a deficiency of assets, answer that of a higher out of his own estate, provided at the time of such payment he had notice of the existence of the superior debt. An executor may voluntarily pay a debt of an inferior nature before one of a superior of which he had no notice; otherwise it would be in the power of a superior creditor to ruin an executor by suppressing his security till all the assets were exhausted in the payment of debts of an inferior degree.

*Harman v. Harman*, 2 Show. 492.

**613.** Among creditors of equal degree an executor Creditors of equal degree. may pay one in preference to another. A voluntary payment of a creditor by an executor or administrator, with notice of the commencement of an action by another creditor and before judgment, is a good payment and will be allowed to him in passing his accounts.

*Re Radcliffe*, 7 C. D. 733.

**614.** The effect of section 34 of R. S. O. (1897), c. Executor paying one creditor in full causes presumption of assets to pay all. 129, is to disable an executor from giving preference to one creditor over another, so that where he pays one creditor in full the presumption is that he has assets sufficient to pay all; and if, upon a final adjustment of the accounts of the estate, it is made to appear that one creditor has received payment in full, either voluntarily or by process of law, and that there is a deficiency of assets, such creditor will be ordered to refund at the instance of the other creditors, the statute thus placing creditors and legatees in this respect upon the same footing.

*Chamberlain v. Clark*, 9 A. R. 273.

**615.** Before the passing of the Devolution of Estates Order in which assets resorted to before Act Act the order in which assets could be resorted to was as follows:

1. The general personal estate not bequeathed at all or by way of residue only.
2. Real estate devised in trust to pay debts.
3. Real estate descended to the heir and not charged with the payment of debts.
4. Real or personal estate charged with the payment of debts, and (as to realty) devised specifically or by way of residue, or suffered, by reason of lapsed devise, to descend, or (as to personalty) specifically bequeathed, subject to that charge.
5. Specific legacies (including demonstrative legacies) and demonstrative legacies which have become general.

6. Specific legacies (including demonstrative legacies that so remain), specific devises and residuary devises not charged with debts.

7. Real or personal estate subject to a general power of appointment which has been actually exercised by deed (in favour of volunteers) or by will.

8. Paraphernalia of widow.

After Act.

**616.** Since the passing of the Act the order will be:

1. The general real and personal estate not devised or bequeathed at all, or devised or bequeathed by way of residue only, whether charged or not with payment of debts, and by reason of lapsed devise suffered to descend subject to that charge.

2. Real estate devised in trust to pay debts.

3. Real and personal estate devised or bequeathed specifically charged with the payment of debts.

4. General pecuniary legacies, including annuities and demonstrative legacies which have become general.

5. General pecuniary legacies, including annuities that so remain, and specific devises, not charged with debts.

6. Real or personal estate subject to a general power of appointment which has been actually exercised by deed (in favour of volunteers), or by will.

7. Paraphernalia of widow.

Canadian Law Times, 1890 Ed., 97.

## CHAPTER II.

## ESTATES OF INSOLVENT DECEASED PERSONS.

**617.** The estates of insolvent deceased persons may be administered according to the provisions of R. S. O. 1897, c. 132, which is as follows:

1. (1) On the administration of the estate of a deceased person, <sup>Creditor</sup> in case of a deficiency of assets, every creditor in proving his claim <sup>holding</sup> shall state whether he holds any security for his claim or any part <sup>security to</sup> thereof, and shall give full particulars of the same, and if such <sup>value the</sup> same, security is on the estate of the deceased debtor, or on the estate of a third party for whom the estate of the deceased debtor is only indirectly or secondarily liable the creditor so proving his claim shall put a specified value on such security, and the executor or administrator, under the authority of the other creditors of the estate of the deceased, or of the Court, if the estate is being then administered under the direction of, or by a Court, may either consent to the creditor's ranking for the claim after deducting such valuation, or he may require from the creditor an assignment of the security at an advance of ten per cent. upon the specified value to be paid out of the estate as soon as the executor or administrator has realized such security, in which he shall be bound to the exercise of ordinary diligence; and in either of such cases the difference between the value at which the security is retained and the amount of the gross claim of the creditor shall be the amount for which he shall rank upon the estate of the deceased debtor.

(2) If the claim of the creditor is based upon negotiable instru- <sup>When</sup> ments upon which the estate of the deceased debtor is only indirectly <sup>claim is</sup> or secondarily liable, and which are not mature or exigible, the <sup>based on</sup> creditor shall be considered to hold security within the meaning of <sup>negotiable</sup> instru- this section, and shall put a value on the liability of the party <sup>ment.</sup> primarily liable thereon as being his security for the payment thereof, but after the maturity of such liability and its non-payment, he shall be entitled to amend and re-value his claim. Ont. Acts, 1889, c. 22, s. 1.

2. A creditor holding any security, as aforesaid, on the estate of <sup>Creditor</sup> a deceased debtor, or on the estate of a third party, for whom the <sup>holding</sup> estate of such debtor is only secondarily liable, may release or deliver <sup>security</sup> up such security to the executor or administrator, or he may <sup>may assign</sup> by <sup>same and</sup> statutory declaration delivered to the executor or administrator set a <sup>rank as</sup>

unsecured  
creditor.

value upon such security; and from the time he shall have so released or delivered up such security, or valued the same, the debt to which such security applied shall be considered as an unsecured debt of the estate, or as being secured only to the extent of the value set upon such security; and the creditor may rank as, and exercise all the rights of an ordinary creditor, for the amount of his claim, or to the extent only of any balance thereof above and beyond the value set upon such security as the case may be. Ont. Acts, 1889, c. 22, s. 2.

When  
creditor  
holding  
security  
fails to  
value  
same.

3. In case a person claiming to be entitled to rank on the estate holds security for his claim, or any part thereof, of such a nature that he is required by this Act to value the same, and he fails to value such security, the Judge of the Surrogate Court, who granted the probate or letters of administration, may, upon summary application by the executor or administrator, of which application three days' notice shall be given to such claimant, order that unless a specified value shall be placed on such security, and notified in writing to the executor or administrator within a time to be limited by the order, such claimant shall, in respect of the claim, or the part thereof for which the security is held, in case the security is held for part only of the claim, be wholly barred of any right to share in the proceeds of such estate, and if a specified value is not placed on such security, and notified in writing to the executor or administrator, according to the exigency of the said order, or within such further time as the said Judge may by subsequent order allow, the said claim or the said part, as the case may be, shall be wholly barred as against such estate. Ont. Acts, 1899, c. 22, s. 3.

Adminis-  
trator und-  
er the di-  
rection of a  
Court.

4. When the estate is being administered by or under the direction of a Court, such Court shall exercise the jurisdiction conferred by the preceding section upon the Judge of the Surrogate Court. Ont. Acts, 1889, c. 22, s. 4.

## CHAPTER III.

## OF THE LIABILITY OF THE EXECUTOR OR ADMINISTRATOR IN RESPECT TO THE ACTS OF DECEASED.

**618.** Besides the payment of the debts of the deceased, the executor or administrator must settle the liabilities of the deceased. These liabilities were formerly of two kinds, personal and real. The personal liabilities were a charge on the assets come to the hands of the executor. The real liabilities were a charge on the heir so far as assets descended to him. Now under section 10 of the Devolution of Estates Act, the personal representative has to satisfy both kinds of liabilities, receiving for that purpose both kinds of assets.

**619.** Section 10 above referred to is as follows:

When any portion of the real estate of a person dying, or after the first day of July, 1886, vests in his personal representatives under this Act, such personal representatives, in the interpretation of any statute of this Province, or in the construction of any instrument to which the deceased was a party, or in which he is interested, shall, while the estate remains in them, be deemed in law his heirs, as respects such portion, unless a contrary intention appears, but nothing in this section contained shall affect the beneficial right to any property, or the construction of words of limitation of any estate in, or by any deed, will, or other instrument. Ont. Stats. 1897, c. 14, s. 31.

**620.** With respect to such claims as are founded upon any personal obligation, contract, debt, covenant or other duty, the right of action on which the testator or intestate might have been sued in his lifetime, survives his death and is enforceable against his executor or administrator.

Wms. p. 1593.



Executor  
answer-  
able for  
debts to  
amount of  
assets.

**621.** The executors or administrators are, therefore, answerable, as far as they have assets, for debts of every description due from the deceased, whether debts of record, as judgments or recognizances, or debts due on special contract, as for rent or on bonds and the like under seal, or debts on simple contracts, as notes unsealed, and promises not in writing either expressed or implied.

Claim for  
damages.

**622.** There is no difference between a promise to pay a debt certain and a promise to do a collateral act which is uncertain and rests only in damages, as a promise by the testator to give such a fortune with his daughter, to deliver up such a bond, etc., for wherever, in those cases, the testator himself is liable to an action his executors shall be liable also.

*Sanders v. Esterbie*, 1 Roll. Rep. 266.

Executors  
need not  
be named  
in contract

**623.** The executors or administrators so completely represent their testator or intestate with respect to the present their testator or intestate with respect to the liabilities above mentioned that every bond or covenant or contract of the deceased includes them, although they are not named in the terms of it, for the executors or administrators of every person are implied in himself.

*Hyde v. Skinner*, 2 P. Wms. 197.

Liability  
against  
executor  
though not  
named.

**624.** In many cases a liability may accrue against the executor or administrator after the death of the testator or administrator after the death of the testator or administrator upon a contract made in his lifetime, although the executor or administrator be not named therein. Thus an executor is liable upon a bond which becomes due, or a note payable subsequently to the death of the testator. So, if A. is bound to build a house for B. before such a time, and A. dies before the time, his executors are bound to fulfil this contract, and in cases of this kind the executors will be liable, even where the heir is named and the executors are not named in the contract.

*Williams v. Burrel*, 1 C. B. 402.

**625.** The executors or administrators formerly more <sup>The heir</sup> actually represented their testator or intestate than the <sup>not bound</sup> heir did the ancestor, for if a man binds himself his execu- <sup>unless</sup> tors or administrators are bound though not named, but <sup>named.</sup> it was not so of the heir, however large an amount of the real assets may have descended to him. But as executors and administrators will hereafter be "heirs" under section 10 above—in all cases if a man binds himself his whole estate will now be liable.

**626.** Executors or administrators are not liable <sup>Executor</sup> upon a contract of the deceased if not named, where the <sup>not bound</sup> contract is personal to the testator or intestate, for in <sup>on personal</sup> such an instance no liability attaches upon the executors <sup>contract.</sup> or administrators, unless a breach was incurred in the life-time of the deceased. Thus, if an author undertakes to compose a work, and dies before completing it, his executors are discharged from this contract, for the undertaking is merely personal in its nature, and by the intervention of death has become impossible to be performed.

*Robinson v. Davison*, L. R. 6 Exch. 269, 274.

**627.** With regard to the liability of an executor in <sup>Liability</sup> respect of the tortious acts of the deceased, it was a prin- <sup>of an exe-</sup> ciple of the common law that if an injury was done either <sup>cutor for</sup> to the person or property of another for which damages <sup>torts of de-</sup> only could be recovered in satisfaction, the action died <sup>ceased.</sup> with the person by whom the wrong was committed.

*Kirk v. Todd*, 21 C. D. 484.

**628.** And if the cause of action was founded upon <sup>Actions</sup> any malfeasance or misfeasance, was a tort, or arose ex <sup>for mal-</sup> delicto, such as trespass for taking goods, trover, false <sup>feasance</sup> imprisonment, assault and battery, slander, libel, divert- <sup>or misfeas-</sup> ing a watercourse, obstructing lights, and in many other <sup>ance.</sup> cases of the like kind the rule was *actio personalis moritur cum persona*, and if the person by whom the injury was committed died no action of that kind could be brought against his executor or administrator.

Forms of  
action now  
abolished.

**629.** Under the old practice in some of the cases above mentioned a remedy which could not be had in one form of action might be had in another. Thus, although at the common law an action of trover upon a conversion of the testator's goods died with him, yet if the goods, etc., taken away continued still in specie in the hands of the executor or administrator of the wrongdoer, replevin or detinue lay against such executor or administrator to recover them back, or trover laying the conversion to have been by the executor, or in case they were sold an action for money had and received to recover their value again. An action on the custom of the realm against a common carrier is for a tort and supposed crime, and the plea was not guilty, therefore, at the common law it did not lie against the carrier's executors, but an action of assumpsit. So, if a man took a horse of another and brought him back again, an action of trespass did not lie at the common law against his executor, though it would against him, but an action for the use and hire of the horse lay against the executor. So, if a man dealt as agent for another without authority, his executor, though he could not be sued for the tort, might be made liable upon an implied contract.

Actions of  
trespass,  
ejectment  
and waste.

**630.** Again, at common law an action of trespass for mesne profits could not be maintained against an executor or administrator, yet he was perhaps liable in an action for use and occupation for the rent up to the date of the demise in the action of ejectment. But if there was a recovery in ejectment no action lay against the executor for use and occupation for the rent subsequent to the day of the demise laid in the plaintiff's pleading; because having treated the holding as founded on trespass, the plaintiff could not afterwards treat it as founded on contract. So an action of waste did not lie at the common law against an executor for waste committed by his testator it being a tort which dies with the person, nor was an executor chargeable for the injury done by his testator in cutting down another man's trees,

but for the benefit arising to his testator from the sale or value of the trees he was.

**631.** So if a man committed equitable waste and died; as where a tenant for life, without impeachment of waste, and as such having a right at law to cut timber on the estate and the property in the trees abused that power by cutting ornamental trees or trees not ripe for cutting, the Court of Equity had the jurisdiction to make the personal representatives of the party who committed such waste accountable for the produce of it.

*Lansdowne v. Lansdowne*, 1 Madd. 116.

**632.** In the modern practice these distinctions are abolished, and forms of action no longer exist.

**633.** The rights and liabilities of executors and administrators with respect to torts or injuries to the person, or to the real or personal estate of the deceased are as already stated enlarged by sections 10, 11 and 12 of The Trustee Act, R. S. O. 1897, c. 129. These sections need not be repeated. They are set out in full in paragraph 340.

**634.** Courts of Equity have always charged persons in the character of trustees with the consequence of a breach of trust, and their representatives also whether they derive benefit from the breach of trust or not.

*Watsham v. Stinton*, 1 De G. J. & S. 678.

**635.** An executor or administrator is bound as far as he has assets to satisfy all judgments recovered against the testator or intestate without regard to the circumstance whether a judgment was founded on a cause of action which would not survive his death, e.g., libel, or slander.

**636.** An executor or administrator is also liable upon a recognizance entered into by the deceased, and upon all the inferior debts of record of the deceased as fines imposed by justices or at the Assizes or General Sessions, or the like.

Joint contracts.

**637.** In case of a joint contract, where several contract on the same part, if one of the parties die his executor or administrator was formerly discharged from all liability, and the survivor or survivors alone could be sued, and if all the parties were dead the executor of the last survivor was alone liable. It has already appeared (paragraph 352) that by section 15 of the The Trustee Act, R. S. O. 1897, c. 129, representatives of deceased joint contractors are liable although the other joint contractors be living.

Partnership debts.

**638.** In the case of a partnership debt, although at law, upon the death of a partner, the remedy against his executor was formerly extinguished, inasmuch as a partnership contract is joint, yet they always could be sued in Equity, and now may be sued as in any other case.

Liability to creditors of firm.

**639.** The estate of a deceased partner is liable in Equity to the creditors of the firm, although the legal remedy exist only against the survivors. The joint creditor may in the first instance resort to the assets of the deceased partner, leaving the personal representatives of the deceased partner to their remedy over against the surviving partner.

*Kendall v. Hamilton*, 3 C. P. D. 403. *Re Hodgson*, 31 C. D. 177.

Discharge of deceased partners estate.

**640.** The deceased partner's estate must continue liable until the debts which affected him at the time of his death are in some way fully discharged. The discharge may take place in various ways, not only by direct payment, but also by dealings with the continuing partners operating as a payment of the joint debt, or from the creditors having agreed to take and taking the security of the surviving partners in discharge of the joint debt. Further, if the dealing of the creditor with the surviving partners has been such as to make it equitable that he should go against the assets of the deceased partner, he will not, upon general rules and principles, be entitled to the benefit of the demand.

*Winter v. Jones*, 4 Miln. & Cr. 101.

**641.** The liability of executors and shareholders in joint stock companies as fixed by the Dominion and Ontario Joint Stock Companies Acts respectively, and in respect of bank shares, has already been stated.

The liability of executors in respect of bank shares has already been stated (paragraph 345).

**642.** In every case where the testator is bound by a covenant the executor shall be bound by it, if it be not determined by the death of the testator; that is, unless it is such a covenant as was to be performed by the person of the testator.

*Bally v. Wells*, 3 Wils. 27.

**643.** The executor is not only liable upon all covenants by the testator, which have been broken in his lifetime, but, moreover he is answerable for all breaches in his own time, as far as he has assets, for the privity of contract of the testator is not determined by his death.

*Coghill v. Freckore*, 3 Mod. 326.

**644.** Again, although a covenant in a lease should be of a nature such as to run with the land so as to make the assignee of the term liable for a breach of it after the assignment. Yet this shall not discharge the executor of the original lessee from a concurrent liability on the covenant as far as he has assets, even although the lessor shall have accepted the assignee as his tenant. Therefore, where the lessee has assigned the term in his lifetime the lessor may still maintain an action of covenant against the executor of the lessee upon an expressed covenant for payment of rent, even although the lessor has accepted the assignee for his tenant, and so may the assignee of the reversion by virtue of the statute 32 Henry VIII. c. 34.

*Rorley v. Adams*, 4 M. & Cr. 534.

**645.** So if the executor himself assigns the term the lessor may afterwards bring covenant against the executor, notwithstanding any acceptance of the assignee

as tenant, and so may also the assignee of the reversion. Therefore, the executor has a right to require from the purchaser of a lease that such purchaser shall covenant for indemnity against the payment of rent, and performance of covenants, notwithstanding the executor himself is not bound to enter into a covenant for title, but only that he has done no act to encumber.

*Rowley v. Adams*, 4 M. & Cr. 540.

Distinction between expressed covenant and covenant in law.

**646.** There is a distinction with respect to this liability between an expressed covenant and a mere covenant in law. For no action lies against an executor or administrator upon a covenant in law which is not broken till after the death of the testator. An executor will be liable for rent accrued after the death of the testator so long as the lease continues, and as far as he has assets, notwithstanding the lessor assigned the term before his death or the executor has done so since. But if the lessor has accepted the assignee as his tenant, then, although an action of covenant may be maintained on an expressed covenant for its payment during the continuance of the lease, no action of debt will lie against the executor for rent accrued since the assignment. If the whole rent was incurred in the lifetime of the testator an action to recover it from the executor must be brought against him in his representative character; but in an action of debt for rent incurred after the death of the lessee, if the executor enters upon the demised premises the lessor has his election either to sue him as executor to charge him personally as assignee in respect of the perception of the profits. If the executor does not enter he is still chargeable as executor, because he cannot so waive the term is not to be liable for the rent as far as he has assets.

Liability for rent after entry by executor.

**647.** Where the executor, having entered, is sued for rent incurred after his entry, he cannot plead plene administravit, even although he be sued as executor, for if the rent be of less value than the land, as the law

prima facie supposes so much of the profits as suffice to make up the rent is appropriated to the lessor, and cannot be applied to anything else, and, therefore, the defence of plene administravit confesses a misapplication, since no other payment out of the profits can be justified till the rent is answered, and if judgment be given against the executor it is de bonis propriis. But if the land be of less value than the rent, the executor may plead a special matter, namely, that he has no assets, and that the land is of less value than the rent.

**648.** The executor is chargeable personally with so much of the land as the premises are worth; therefore if the profits have been less than the land, and therefore cover a part only, that part should be admitted and the rest defended for.

Extent of  
executors  
liability on  
lease.

**649.** On the same principle although an executor, generally speaking, cannot waive the term, for he must renounce the executorship in toto or not at all, yet if the value of the land is of less amount than the rent, and there is a deficiency of assets, he may waive such a lease. And if there are assets to bear the yearly loss for some years, but not during the whole term, then the executor must pay the rent as long as the assets hold out, and must then waive the possession, giving notice to the reversioner. But if the executor be sued as executor for rent incurred after the death of the testator, he may plead plene administravit, for that is a good defence wherever no other judgment can be given, but only against the defendant as executor. So where an executor is charged as executor in covenant for non-payment incurred in the defendants own time plene administravit is a good defence, although the defendant might have been charged as assignee of the term.

Waiver of  
lease by  
executor.

*Collins v. Crouch*, 13 Q. B. 542.

**650.** If the term was assigned by the testator, it seems clear that the executor cannot be charged as assignee, because the lease did not pass to him, but still

Term as-  
signed by  
testator.



he will be liable as executor for the rent, unless the lessor has accepted the assignee as his tenant, and even in that case the executor will be liable as executor on the covenant.

Executor  
entering  
assigning  
lease.

**651.** If the executor enters and afterwards himself assigned the lease, then he is chargeable as assignee for that time only during which he occupied, and if he is sued for rent incurred by himself since the assignment he is liable in his representative character only.

Purchaser  
of real es-  
tate dying  
without  
paying  
purchase  
money.

**652.** If the purchaser of real estate dies without having paid the purchase money his heir-at-law or the devisee of the land purchased will be entitled to have the estate paid for by the executor or administrator, and if the personal estate cannot be got in, and the heir or devisee pays for the land out of his own pocket he may afterwards call upon the personal representative to reimburse him. So, if the personal estate is insufficient to perform the contract, and the agreement is on that account rescinded, yet the heir or devisee will be entitled to the personalty so far as it goes. But if by reason of the complication of the testator's affairs, the purchase money cannot be immediately paid, and the vendor for that reason rescinds the contract, yet on the coming in of the assets the devisee of the estate contracted for may compel the executor to lay out the purchase money in the purchase of other estates for his benefit. But if a title cannot be made, or there was not a perfect contract, or the Court should think the contract ought not to be executed, in all these cases there is no conversion of real estate into personal upon which the right of the executor, on the one hand, and of the heir or devisee, on the other, depends, and therefore, if the vendor dies the estate will go to the heir-at-law of the vendor in the same manner as if no contract had been entered into, and the heir or devisee of the purchaser will not be entitled to the money agreed to be paid for the lands, or to have any other estate bought for him.

**653.** Where a specific legacy is pledged or charged by the testator, the specific legatee is entitled to have his legacy redeemed or exonerated by the executor, and if the executor fails to perform that duty, the specific legatee is entitled to compensation of the amount of his legacy out of the general assets of the testator. Therefore, if a legacy be of a silver cup or of a jewel, and it be in pledge at the testator's death, the legatee has a right to call upon the executor to redeem it, and to deliver it to him.

**654.** Legatees of specific legacies of shares in bank- or other companies are, generally speaking, liable to pay calls made subsequent to the testator's death.

**655.** On the death of a master the agreement for services on the part of an apprentice is at an end, generally speaking, and it seems that the executors of the master are discharged from all agreements and covenants for the instruction of the apprentice; for these are considered as personal to the testator and determined by his death. But the covenant on the part of the master for maintenance of the apprentice still continues in force; and therefore executors are liable in an action on covenant as far as he has assets, if he neglects to maintain him.

*R. v. Chaplain, Comberb, 324.*

**656.** If a man perform services for the testator without any view to a reward, but in expectation of a legacy, he cannot, in the absence of an understanding between the parties that he was to be paid only by a legacy set up any demand for his services against the executor or administrator.

*LeSage v. Coussmaker, 1 Esp. 188.*

**657.** An executor cannot be compelled to complete the gift of the testator, therefore, an act of bounty which has not been perfected by the testator is of no avail against his executor.

*Nield v. Smith, 14 Ves. 491.*

A son working at home upon his father's place would not be entitled to recover for work and labour in the absence of an agreement to that effect.

*Campbell v. McKerricher*, 6 O. R. 85.

Where services are performed for a relative or other person upon a mere reliance that the party serving will share his bounty under his will, such services will not support an action as upon an implied assumption to pay in money.

*Whypatt v. Marsh*, 4 U. C. R. 485.

See *McClarty v. McClarty*, 19 C. P. 311.

Compensation may be recovered as damages for breach of the promises.

*Smith v. McGowan*, 24 A. R. 542.

See *Murdoch v. West*, 24 S. C. R. 305.

#### Escrow

**658.** If a person who has delivered a deed as an escrow to be handed over to the party for whose use it is made, upon the performance of some condition, happen to die before the performance of the condition, and the condition be afterwards performed, the deed is available, notwithstanding the death of him who made it.

*Copeland v. Stephens*, 1 B. & A. 606.

#### Continuing guarantee

**659.** If a man enters into a continuing guarantee and dies his executor is not liable upon it for advance made after the testator's death, which operates as a revocation.

*Bradley v. Morgan*, 1 Hurlst. & C. 240.

Under the Devolution of Estates Act the executor of a deceased lessor can make a valid renewal of a lease pursuant to the covenant of the testator to renew.

*Re C. P. R. and National Club*, 24 O. R. 205.

## CHAPTER IV.

## PAYMENT OF LEGACIES.

The next duty of an executor after payment of debts is payment of legacies.

**600.** A legacy is defined to be "some particular thing or things given or left, either by a testator in his testament, wherein an executor is appointed, to be paid or performed by his executor, or by an intestate in a codicil or last will, wherein no executor is appointed, to be paid or performed by an administrator." *Legacy defined.*

*Ward v. Grey*, 26 Bony. 485.

Legacy validated by codicil.

*Purcell v. Bernin*, 20 A. R. 535.

Acceptance of legacy.

*Robertson v. Junkin*, 26 S. C. R. at 496.

**601.** Of legacies there are two kinds—general and specific. A legacy is general when it is so given as not to amount to a bequest of a particular thing or money of a testator distinguished from all others of the same kind. A legacy is specific when it is a bequest of a specified part of the testator's personal estate, which is so distinguished. Thus, for example, "I give a diamond ring," is a general legacy, which may be fulfilled by the delivery of any ring of that kind; while, "I give the diamond ring presented to me by A.," is a specific legacy, which can only be satisfied by the delivery of the identical subject. Again, if the testator, having many brooches or horses, bequeath a "brooch" or "a horse" to B., in these cases the legacy is general. But a bequest of such a part of my stock of horses which A. shall select, to be fairly appraised, to the value of \$800," or of "all the horses which I may have in my stable at the time of my death," is specific. *Kinds of legacies.*

Wms. p. 1019.

Difference  
between  
general  
and speci-  
fic legacies

**662.** The distinction between these two sorts of legacies is of the greatest importance; for, if there be a deficiency of assets, a specific legacy will not be liable to abate with the general legacies; while, on the other hand, if the specific legacy fail by the ademption or inadequacy of its subject, the legatee will not be entitled to any recompense or satisfaction out of the general personal estate. So that, though specific legacies have in some respects the advantage of those that are general, yet in other respects they are distinguished from them to their disadvantage.

Wms. p. 1020.

Specific  
bequest of  
thing not  
in exist-  
ence.

**663.** Again, if there be a specific bequest of a thing described as already in existence, and no such thing ever did exist among the testator's effects, the legacy fails. Thus, although a gift of "my grey horse" will pass a black horse, which is not strictly grey, if it be found to have been the testator's intention that it should pass by that description; yet if the testator had no horse, the executor is not to buy a grey one. On the other hand, if the bequest is of "a horse," and no horse be found in the testator's possession at the time of his death, the executor is bound, provided the state of the assets will allow him, to procure a horse for the legatee.

Wms. p. 1020.

**664.** It seems to have been once considered as the criterion of a specific legacy, that it is liable to ademption. But this has since been repeatedly denied. And it has ever been held that a legacy may be specific, notwithstanding the testator expressly provides that it "shall not be deemed specific, so as to be capable of ademption."

*Jacques v. Chambers*, 2 Coll. 435.

Ademp-  
tion.

**665.** A testator bequeathed to W. L. £1,500, "due to me by R. C., and secured by mortgage." After the making of this will, and in testator's lifetime, R. C. sold to one H., the property mortgaged, and the testator, to

facilitate the sale and secure the debt due him, took from H. a mortgage of this and other property, and a covenant to pay the amount; retaining the mortgage from R. C., under which he held the legal estate in the land, and the bond originally obtained from R. C. for the debt. The testator died without altering his will in regard to this legacy. Held, that the legacy was not adeemed.

*Loring v. Loring*, 12 Chy. 493.

**666.** The testator by his will made in July, 1877, devised to his son G. certain real estate and brewery, expressing that "this devise be accepted by and to be in full discharge of any and every claim he shall have against my estate at the time of my decease." In a subsequent clause, "L," the testator declared that in the event of selling lands specifically devised, the proceeds were to be substituted for the lands by charging the proceeds against the real estate of the testator. The testator was indebted to G. in the sum of \$36,146.86, and on the 8th of October, 1879, the parties met and agreed that the testator should sell part of the lands devised to him, including the brewery, to G. for \$27,000, and the brewery plant for \$6,987.20, which was credited on G.'s claim against the testator. G. subsequently, under clause "L," claimed against the estate of the testator, payment of the amount for which the brewery premises and plant were sold, he swearing that he was ignorant of the contents of the will. Thereupon the plaintiffs, two of the executors and trustees, instituted proceedings seeking to obtain a construction of the will. Held, reversing the judgment of the Court below, that the agreement entered into between the father and son superseded the devise to the son.

*Archer v. Scriven*, 8 A. R. 725.

**667.** Courts in general are averse, from construing legacies, to be specific, and the intention of the testator with reference to the thing bequeathed must be clear. To enter into a discussion as to what legacies are to be

Courts are  
averse to  
specific  
legacies.

construed as specific, and what general, is part of the subject of construction of a will.

Cases of  
specific  
legacies.

**668.** It may be stated, however, that as to legacies of money. Under some circumstances such legacies may be held to be specific, as, of a certain sum of money in the hands of A.

2. Every devise of land is specific, and so is a bequest of a lease for years of a farm.

3. As to bequests contained in the residuary clause, the question whether such bequests are specific or general may become important where it is contended that the bequest is specific, so as to exonerate the personal estate, which is the subject of it, from debts and legacies, and charge the realty therewith, or where the personal estate so bequeathed comprises property which is wearing out rapidly, such as leaseholds or long annuities, and it is given to one for life, remainder to another.

General  
bequests of  
personal  
estate.

**669.** The bequest of all a man's personal estate generally is not specific, but if a man having personal property at A., and elsewhere bequeath all his personal estate at A. to a particular person, the legacy is specific.

*Robertson v. Broadbent*, 8 App. Cas. 812.

General  
residuary  
clause.

**670.** A general residuary clause is not the less general because it contains an enumeration of some of the particulars of which it may consist. Nor does the fact that a specific legacy is excepted out of a general residue make a gift of that general residue specific.

*Taylor v. Taylor*, 6 Sim. 246.

Contingent and  
executory  
interests.

**671.** Contingent and executory interests, though they do not vest in possession, may vest in right, so as to be transmissible to the executors or administrators of the party dying before the contingency upon which they depend takes effect. Where that contingency is the endurance of life of the party till a particular period, the interests will obviously be altogether extinguished by his death before that period.

Wms. p. 1071.

**672.** The general principle as to the lapse of legacies by the death of the legatee, may be stated to be that if the legatee die before the testator's decease, or before any other condition precedent to the vesting of the legacy is performed, the legacy lapses, and is not payable to the executors or administrators of the legatee. <sup>Lapse of legacies.</sup>

**673.** Unless a legatee survives the testator the legacy is extinguished, neither can the executors or administrators of the legatee demand it. <sup>Extinguishment.</sup>

Old authorities, Wms. p. 1072.

**674.** Even where a legacy is given to a man and his executors, administrators and assigns, or to a man and his representatives, if the legatee dies before the testator, though the executors are named yet the legacy is lost. If, instead of personal representatives, the word "heirs" be used, it has been held that this shows an intention on the part of the testator that the persons he designates as heirs are to take by way of substitution whenever the legatee may die, and there shall be no lapse, though he die in the lifetime of the testator. <sup>Legatee dying before testator.</sup>

*Re Porter's Trusts*, 4 Kay & J. 188.

**675.** A testator bequeathed personal estate to his two sisters, M. and S., and to their children, all to share alike if living. One of the sisters died before the testator. Held, that her share lapsed.

*Bradley v. Wilson*, 13 Chy. 642.

**676.** A testator devised all his estate ("lands and chattels") to his mother for life, and after her death to his sister P. H., absolutely, charged with legacies to several persons. One of the legatees died after the testator, but before his mother, the tenant for life. Held, that the legacy did not lapse, but was a vested interest in the legatee, and as such went to his personal representative.

*Pollard v. Hodgson*, 22 Chy. 287.



Testator  
may de-  
clare that  
legacy  
shall not  
lapse.

**677.** A testator may declare on the face of a will that the legacy shall not lapse, and he may provide a substitute for the legatee dying in his lifetime. To effect this object he must declare expressly, or in terms from which his intention can be with sufficient clearness collected, what person or persons he intends to substitute for the legatee dying in his lifetime.

*Brown v. Hope*, L. R. 11 Eq. 343.

Legacy to  
two  
jointly.

**678.** If a legacy be given to two persons jointly, although one of them happen to die before the testator, such interest will not be considered lapsed or undisposed of, but will survive to the other legatee; but where legacies are given to legatees as tenants in common, if any of them die before the testator, what was intended for those legatees will lapse into the residue.

*Montey v. Blad*, 3 Ves. 628.

Legacy to  
one for life.

**679.** In case of a legacy to a legatee for life, with remainder to another legatee, if the tenant for life dies before the testator, the remainder over takes effect upon the death of the testator.

*Lee v. Palm*, 4 Hare, 225.

Legacy  
with limi-  
tation over.

**680.** If a legacy be given to a person with a limitation over if he should die under twenty one, or before the happening of any other event, and he dies in the lifetime of the testator under the prescribed age, or before such other event happens, the legacy over does not lapse.

*Re Gaitskell's Trusts*, L. R. 15 Eq. 386.

Time  
when  
legacy pay-  
able.

**681.** If a legacy be given generally without specifying the time when it is to be paid, it is due on the day of the death of the testator, though not payable till the end of the year next after the testator's death. This delay is merely an allowance of time for the convenience of the executor, and does not prevent the interest vesting immediately on the testator's death. Hence, if the legatee happen to die within the year his personal representative will be entitled to the legacy.

*Garthshore v. Challe*, 10 Ves. 13.

**682.** When a future time for the payment of a legacy is defined by the will the legacy will be vested or contingent according as, upon construing the will, it appears whether a testator meant to annex the time to the payment of the legacy or to the gift of it. Future time for payment of legacy defined

In ascertaining the intention of the testator in this respect, the Courts of Equity have established two positive rules of construction: 1st. That a bequest to a person payable, or to be paid at or when he shall attain twenty-one years of age, or at the end of any other certain determinate term, confers on him a vested interest immediately on the testator's death, as *debitum in presenti solvendum in futuro*, and transmissible to his executors or administrators, for the words "payable" or "to be paid," are supposed to disannex the time from the gift of the legacy, so as to leave the gift immediate, in the same manner in respect of its vesting, as if the bequest stood singly, and contained no mention of time. 2nd. That if the words "payable" or "to be paid" are omitted, and the legacies are given at twenty one, or if, when, in case, or provided the legatees attain twenty one or any other future definite period, these expressions annex the time to the substance of the legacy, and make the legatee's right to it depend on his being alive at the time fixed for its payment. Consequently, if the legatee happens to die before that period arrives, his personal representative will not be entitled to the legacy. Rules of construction.

*Shrimpton v. Shrimpton*, 31 Bevy. 425.

*Hanson v. Graham*, 6 Ves. 245.

**683.** The exceptions to the first rule are: 1. The rule itself is always subservient to the intention of the testator, and, therefore, if upon construing the whole will, it clearly appears, that the testator meant the time of payment to be when the legacy should vest, no interest shall be transmissible to the executors or administrators if the legatee dies before the period of payment. If the testator thinks proper to say distinctly that his legatees, general Exceptions to first rule.

or residuary, shall not be entitled to the property unless they live to receive it, there is no law against such intention, if clearly expressed.

*Johnson v. Crook*, 12 C. D. 639.

2. If the event upon which the legacy is directed to be paid be uncertain as to its taking place, then the legacy becomes a conditional legacy, and will not devolve on the executors or administrators unless the conditions be performed by the happening of the event.

Old Authorities, Wms. p. 1091.

Excep-  
tions to  
second  
rule.

**684.** The exceptions to the second rule are:

1. Where a testator bequeaths a legacy to a person at a future time, and either gives him the intermediate interest or directs it to be applied for his benefit, the Court there construes the disposition of the interest to be an indication of the testator's intention that the legatee should, at all events, have the principal, and on these grounds holds such legacies to be vested.

*Vaudry v. Geddes*, 1 R. & M. 208.

2. Where a person bequeaths a sum of money, or other personal estate to one for life, and after his decease to another, the interest of the second legacy is vested, and his personal representatives will be entitled to the property, though he dies in the lifetime of the person to whom the property is bequeathed for life.

*Leake v. Robinson*, 2 Meriv. 363.

Children  
take vested  
interest

**685.** In construing a settlement or will which makes a provision for children subject to a prior life-interest, the Court leans strongly in favour of that construction by which the children will take a vested interest at twenty-one or marriage, whether they survive the tenant for life or not. The presumption is that the child acquires a vested and transmissible interest at the period when it is most needed, viz., at twenty-one, if a son, or on marriage or at that age, if a daughter.

*Re Knowles*, 21 C. D. 806.

**686.** As to legacies payable out of real estate only, <sup>Legacies payable out of real estate.</sup> the first rule, as above stated, as adopted, with reference to legacies payable out of the personal estate, viz., that when the gift and time of payment are distinct the legacy vests immediately, does not hold, generally speaking.

Wms. p. 1117.

**687.** There is an exception to this rule respecting <sup>Exceptions to rule as to legacies charged on land.</sup> vesting of legacies charged on land. Thus, when a legacy is bequeathed to a child on attaining twenty-one or marrying, or any other event personal to him, the legacy is evidently postponed to the time specified, from its being considered that the legatee will then want the benefit of the legacy; whereas, when the estate is devised to a person for life, and after his decease is charged with the legacy, the legacy is evidently postponed till the decease of the devisee for life from its being incompatible with his life estate, that it should be raised in his lifetime.

**688.** It sometimes happens that legacies are <sup>Legacies charged on mixed fund.</sup> charged on a mixed fund; that is, both on real and personal estate. In that case the personal estate is considered to be the primary fund and the real estate to be the auxiliary fund for the payment of legacies. So far as the personal fund will extend to pay them the case is governed by the same rules as if the legacies were payable out of the personal estate only. So far as the real estate must be resorted to for the payment of the legacies, the case is governed by the same rules as if they were charged on real estate only.

*Re Hudson's Trusts*, 1 Dru. 6.

**689.** Legacies directed to be paid out of a mixed residue are a charge on land.

*Young v. Purves*, 11 O. R. 597.

**690.** A conditional legacy is defined to be a bequest, <sup>Conditional legacy.</sup> whose existence depends upon the happening or not happening of some uncertain event by which it is either to take place or be defeated.

Conditions  
precedent  
or subse-  
quent

**691.** Conditions are either precedent or subsequent. When a condition is precedent the legatee has no vested interest till the condition is performed. When a condition is subsequent the interest of the legatee vests in the first instance, subject to be divested by the non-performance or breach of the condition.

Impos-  
sible con-  
dition pre-  
cedent.

**692.** When a condition precedent to the vesting of the legacy is impossible the bequest is discharged of the condition, and the legatee will be entitled as if the legacy were unconditional. If the impossibility of the condition is unknown to the testator, the impracticability of the performance will be a bar to the claim of the legatee.

*Louth v. Cavendish*, 1 Eden, 116.

Impos-  
sible con-  
dition sub-  
sequent.

**693.** Where a condition subsequent is impossible, the condition is void, and the legacy single and absolute. If a condition precedent requires an act which is *malum in se* then not only the condition but the bequest itself is void.

*Walker v. Walker*, 2 De G. F. & J. 255.

Perform-  
ance of  
condition  
subse-  
quent il-  
legal.

**694.** When a performance of a condition subsequent is illegal, then the condition is void, and the bequest freed from it as though it had been given unconditionally.

*Egerton v. Lord Brownlow*, 4 H. L. C. 1.

Perform-  
ance of  
condition  
precedent

**695.** Although the general rule is that conditions precedent must be strictly performed, yet if the condition is performed so as to substantially fulfil the testator's intention it is sufficient. But the observance of the time mentioned in the condition may be material to the due performance of it. In all cases where there is a limitation over of the legacy, upon the legatee not performing a condition within the time prescribed for that purpose, if the terms are not literally applied, when the condition will be held not to be performed within the intent and meaning of the testator.

**696.** With respect to the performance of conditions subsequent, the general rule is that they are to be construed with great strictness, as they go to divest estates already vested; therefore, the very event must happen, or the act with all its details must be done in order to deprive the legatee of his legacy.

*Re Clark's Trusts*, L. R. 9 Eq. 378.

**697.** A condition that the legatee shall not dispute the will is valid, though it has been in general considered as in terrorem merely, and will not operate as a forfeiture by reason of the legatees having disputed the validity or effect of the will, but where the legacy is given over to another person, in case of a breach of such condition, then if the legatee controvert the will his interest will cease and vest in the other legatee. If, instead of being given over to a stranger, the legacy is limited over to the executors, in the event of the condition being broken, such condition is still merely regarded as in terrorem and not obligatory.

*Cooke v. Turner*, 15 M. & W. 727.

**698.** As to conditions in restraint of marriage, conditions which do not directly or indirectly import an absolute injunction to celibacy are valid; thus, conditions restraining marriage under twenty-one, or other reasonable age, without consent of executors, guardians, etc., or requiring or prohibiting marriage with particular persons, and the like, are valid and legal conditions.

*Hodgson v. Halford*, 11 C. D. 959.

**699.** The law will not allow conditions in absolute restraint of marriage, but if property is limited to a person until that person marries, and when such marriage happens, then over, such limitation may be valid.

*Jones v. Jones*, 1 Q. B. D. 179.

**700.** As to conditions in restraint of marriage without consent, not under the age of twenty-one or other reasonable age, but generally, such conditions are in terrorem merely, if there is no disposition over, and,

whether precedent or subsequent are inoperative for the vesting or divesting of a legacy; but if there is a direction that the legacy, in the event of a breach or non-performance of such a condition, shall go over to another legatee, the condition is obligatory.

*Lloyd v. Branton*, 3 Mer. 116.

Requiring marriage with consent.

**701.** In the instance of conditions requiring marriage with the consent of executors or trustees, it has been decided that such consent must be obtained before or at the marriage. A subsequent approbation will not be a performance of the condition.

*Clarke v. Parker*, 19 Ves. 17.

Unconditional consent.

**702.** A general consent given to the legatee after attaining majority will be sufficient, and an unconditional consent once given cannot be retracted unless for good reasons, moral or pecuniary, afterwards discovered.

*LeJeune v. Budd*, 6 Sim. 441.

Refusal to consent.

**703.** If an executor or trustee, whose consent is required, refuse to execute his power, the Court will direct an enquiry into the proposed marriage and as to its propriety.

*Clarke v. Parker*, 19 Ves. 18.

Legacies to person as executors.

**704.** Where legacies are given to persons in the character of executors, and not as marks of personal regard only, such bequests are considered to be given upon an implied condition, namely, that the parties clothe themselves with the character in respect of which the benefits were intended for them.

*Abbot v. Massey*, 3 Ves. 148

Presumption in such cases.

**705.** The presumption is that a legacy to a person appointed executor is given to him in that character, and it is on him to show something in the nature of the legacy, or other circumstances arising on the will to repel the presumption. The presumption will be rebutted, if it appears either from the wording of the bequest or from the fair construction of the will that the

bequest is given to him independently of his character as executor.

*Re Appleton*, 29 C. D. 803.

**706.** If the legatee prove the will with an intention to act under it, that will be a sufficient performance of the condition, or if the legatee unequivocally manifests an intention to act in the executorship, as by giving directions about the funeral of the testator, and be prevented by death from further entering upon his office, that will also be a performance of the condition.

*Lewis v. Matthews*, L. R. 8 Eq. 277.

**707.** Where the testator has twice bequeathed a legacy to the same person, it becomes a question whether the legatee be entitled to both or one only; that is, whether the second legacy shall be regarded as merely a repetition of the prior bequest, or whether it shall be construed as an additional bounty and cumulative to the former benefit.

*Lobley v. Stocks*, 19 Beav. 393.

**708.** 1st. Where there is no internal evidence of intention, the following positions of law appear established.

I. If the same specific thing is bequeathed twice to the same legatee in the same will, or in the will, and again in a codicil, in that case he can claim the benefit only of one legacy, because it could be given no more than once.

II. Where two legacies of quantity of equal amount are bequeathed to the same legatee in one and the same instrument, there also the second bequest is considered a mere repetition, and he shall be entitled to one legacy only.

III. Where two legacies of quantity of unequal amount are given to the same person in the same instrument, the one is not merged in the other, but the latter shall be regarded as cumulative, and the legatee is entitled to both.



IV. Lastly, where two legacies are given simpliciter to the same legatee by different instruments in that case, also, the presumption is, that the latter is cumulative, whether its amount be equal or unequal to the former.

Wms. p. 1156.

2nd. Where there is internal evidence of the intention of the testator. In many cases the will or codicil affords intrinsic evidence that the second gift was intended by the testator as a mere substitution for the first, and consequently that one legacy alone was intended. For example, where a later codicil appears to be a mere copy of the former, with the addition of a single legacy, or when it is manifest that the latter instrument was made for the purpose of explaining or better ascertaining the legacies bequeathed by the former. So, if in two instruments the legacies are not given simpliciter, but the motive of the gift is expressed and in both instruments the same motive is expressed and the same sum is given, the Court considers the two coincidences as raising a presumption that the testator did not, by the second instrument, mean a second gift, but meant only a repetition of the former gift. But the Court raises this presumption only where the double coincidence occurs of the same motive and the same sum in both instruments. It will not raise it if the same motive be expressed in both instruments, and the sums be different. Consequently, the legatee is in such case entitled to both sums.

*Russell v. Dickson*, 4 H. L. C. 293.

*Lord v. Sutcliffe*, 2 Sim. 273.

Internal  
evidence  
that legacy  
cumula-  
tive.

**709.** The ordinary inference that legacies are cumulative, arising from the fact of their being of unequal amount, or of their being given by different instruments, may be strengthened by internal evidence as, where one is given generally, and the other for an express purpose, or where one reason is assigned for the former, and another for the latter; or where the legacies are not ejusdem generis, as where an annuity and a sum of money are

given, or two annuities of the same amount by different instruments, the one payable quarterly, the other half-yearly; or where one legacy is vested and another contingent.

*Lee v. Pain*, 4 Hare, 223.

**710.** Where a debtor bequeaths to his creditor a legacy equal to or exceeding the amount of his debt, it is presumed, in the absence of any intimation of a contrary intention, that the legacy was meant by the testator as a satisfaction of the debt. This presumption of satisfaction is rebuttable, as, where the debt was not contracted till after the making of the will, or where the debt is due upon a current account, or where it was upon a bill of exchange or other negotiable security.

Debtor  
bequeath-  
ing legacy  
to creditor

*Re Fletcher*, 38 C. D. 573.

**711.** If a legacy is at all contingent or uncertain, it is not deemed a satisfaction of a debt; nor where the legacy is payable immediately after the death of the testator. A legacy of a specific chattel is not a satisfaction of a debt.

Legacy  
contingent  
not satisfac-  
tion.

*Byde v. Byde*, 1 Cox, 49.

**712.** Where a parent is under obligation by articles or settlement to provide portions for his children, and he afterwards makes a provision by will for them, such testamentary provision is presumed to be a satisfaction or performance of the obligation.

Presump-  
tion of sat-  
isfaction  
or per-  
formance.

*Thynne v. Glengall*, 2 H. L. C. 131.

**713.** This presumption may be repelled or fortified by intrinsic evidence derived from the nature of the two provisions. Where the two provisions are of the same nature, or where there are but slight differences, the two instruments afford intrinsic evidence against a double provision. Where the two provisions are of a different nature, the two instruments afford intrinsic evidence in favour of a double provision.

Presump-  
tion, how  
repelled.

*Glover v. Harcup*, 34 B. & W. 74.

Creditor  
bequeath-  
ing legacy  
to debtor.

**714.** Where a creditor bequeaths a legacy to his debtor, and either does not notice the debt or mentions it in such a manner as to leave his intention doubtful; and after his death the securities for the debt, if any exist, are found uncanceled among the testator's property, the legacy to the debtor is not considered as necessarily or even prima facie a release or extinguishment of the debt.

Evidence  
required.

**715.** Evidence clearly expressive of the intention to release is required if a testator expressly bequeaths the debt to his debtor; this, being no more than a release by will operates only as a legacy and the debt is assets, therefore subject to the payment of the testator's debts.

*Eden v. Smyth*, 5 Ves. 341.

Legatee  
indebted  
to testator

**716.** Where a legatee is indebted to the testator, the executor may retain the legacy either in part or full satisfaction of the debt by way of a set-off.

*Strong v. Bird*, L. R. 18 Eq. 315.

Appoint-  
ment of  
debtor to  
office of  
executor.

**717.** Where there is an appointment of a debtor to the office of executor, the debt due from the debtor-executor is considered to have been paid to him by himself, and the executor is accountable for the amount of his debt as assets.

*Strong v. Bird*, L. R. 18 Eq. 315; *Re Appelbe* (1891) 3 Chy. 422; *Re Hyslop* (1894) 3 Chy. 522.

Appoint-  
ment of  
creditor  
executor

**718.** If a debtor makes his creditor, or the executor of his creditor, his executor, this alone is no extinguishment of the debt though there be the same hand to receive and pay; but if the executor has assets of the debtor, it is an extinguishment because it is within the rule that the person who is to receive the money is the person who ought to pay it, but if he has no assets he is not the person who ought to pay, though he is the person who ought to receive it.

Inconsis-  
tent gift.

**719.** If a gift to one legatee in the earlier part of the will is inconsistent with a subsequent gift to another legatee in the will, or in a codicil, this inconsistency operates as an ademption or revocation of the earlier gift.

**720.** As to specific legacies; in order to complete the title of a specific legatee to his legacy, the thing bequeathed must, at the testator's death, remain in specie as described in the will, otherwise the legacy is considered as revoked by ademption. For instance, if the legacy be of a specified chattel, in possession, as of a gold chain, or a bale of wool, or a piece of cloth, the legacy is adeemed, not only by the testator's selling or otherwise disposing of the subject in his lifetime, but also if he should change its form so as to alter the specification of it; as if he should convert the gold chain into a cup, or the wool into cloth, or make the piece of cloth into a garment, the legacy shall be adeemed.

Completion of title to specific legacies.

**721.** The rule of ademption does not apply to demonstrative legacies, i.e., to legacies of so much money, with reference to a particular fund for payment. As for instance, legacies given out of a particular stock, or debt, or term; for although the particular fund be not in existence at the testator's death, the legatees will be entitled to satisfaction out of the general estate.

No ademption of demonstrative legacies.

**722.** If a testator pawns or pledges an article specifically bequeathed, a right of redemption is left in him and passes to the legatee at his death so as to enable him to call on the executor to redeem and deliver it to him.

Testator pledging article specifically bequeathed.

**723.** If a father gives a legacy to a child it must be understood as a portion, because it is a provision by a parent for his child; and if the father afterwards advances a portion for that child, as upon marriage, it will be a complete ademption of the legacy, where the advances are equal or larger than the testamentary portions.

Presumption of portion.

*Ex p. Pye*, 18 Ves. 153.

**724.** Where the sums advanced are less than the sums bequeathed, it is an ademption pro tanto.

Ademption pro tanto.

*Re Pollock*, 28 C. D. 552.

(2) *Who may be legatee.*

Who may  
be legatee.

**725.** Every person is capable of being a legatee. A bankrupt may be a legatee, but the interest in the legacy belongs to the assignees.

**726** By s. 17 of the Ontario Wills Act, if any person attests the execution of any will to whom, or to whose wife or husband, any beneficial devise, legacy, estate, interest, gift, or appointment of, or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), is thereby given or made, such devise, legacy, estate, interest, gift or appointment, shall so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person, or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift or appointment, mentioned in such will.

R. S. O. 1897, c. 128, s. 17 (s. 17, R. S. O. 1887, c. 109).

(3) *Of the payment of legacies.*

Payment  
of legacies  
causing de-  
ficiency.

**727.** It is obvious that as the whole personal estate is liable in the hands of the executor to the payment of the debts of the testator, the executor must take care to discharge them before he satisfies any description of legacy. There is no distinction in this respect in favor of specific legacies. Hence, if an executor, although acting bona fide and under the conviction that the assets are amply sufficient for the payment of the testator's debts, permits specific legatees to retain or possess articles bequeathed to them, he will be answerable for the value of those articles, if there should ultimately be a deficiency of assets, although the deficiency should be occasioned by subsequent events, which he had no reason to anticipate; and the

Court will direct an account to be taken of the value of the property so possessed by the legatees, and interest to be computed, unless it is certain that the assets will ultimately be sufficient to pay all the creditors.

Wms. p. 1202.

**728.** Where there is a suit for the administration of a testator's assets, a creditor will be permitted, on paying the costs of the proceedings, to prove his debt, as long as there happens to be a residuary fund in Court, or in the hands of the executor, and to pay out of that residue. If a creditor does not come in till after an executor has paid away the residue, he is not without remedy, though he is barred from the benefit of the judgment. If he chooses to sue the legatees and bring back the fund, he may do so; but he cannot affect the legatees, except by suit; and he cannot affect the executor at all.

Creditor allowed in to prove his claim.

Wms. p. 1208.

(4) *Of the abatement of legacies.*

**729.** In case the assets be sufficient to answer the debts and specific legacies, but not the general legacies, the latter are subject to abatement.

Abatement as between legatees.

**730.** This abatement must take place among all the general legatees in equal proportions; and the executor has no power to give himself a preference in regard to his own legacy.

**731.** Generally speaking, nothing shall, in such cases, be abated from the specific legacies. But if the testator bequeaths specific legacies, and also pecuniary legacies, and directs by his will that such pecuniary legacies shall come out of all his personal estate, or words equivalent thereto; then, if there be no other personal estate than the specific legacies, they must be intended to be subject to those which are pecuniary; otherwise, the words of the bequest to the pecuniary legatees would be nugatory.

Specific legacies not abated

Wms. p. 1211.

Particular  
general  
legatees.

**732.** A residuary legatee has no right to call upon particular general legatees to abate. The whole personal estate, not specifically bequeathed, must be exhausted before those legatees can be obliged to contribute anything out of their bequests.

*Baker v. Farmer*, L. R. 3 Ch. App. 537.

Annuities  
must be  
paid.

**733.** So if there is a simple bequest of an annuity, there is no doubt but that, however great or small the income of the testator's property may be, the annuity must be paid in full to the last farthing of the property.

*Croly v. Weld*, 3 DeGex, M. & G. 996.

Life in-  
terest and  
rever-  
sioner.

**734.** The general rule is that if there be a clear gift of a life interest and a reversion, and the estate proves insufficient, each party, the tenant for life and the reversioner, must bear the loss in proportion to his interest; but if there is a gift of an annuity, and a residuary gift, the annuity takes precedence, and the whole loss falls on the residuary legatee.

*Mitchell v. Wilton*, L. R. 20 Eq. 269.

No pref-  
erence  
among  
general

**735.** Among legacies in their nature general, there is no preference of payment; they shall all abate together, and proportionally, in case of a deficiency of assets to satisfy them all. But this must be understood only as among legatees, who are all volunteers; for if there be any valuable consideration for the testamentary gift, as where a general legacy is given in consideration of a debt owing to the legatee, or of the relinquishment of any right or interest, as of her dower by a widow, such legacy will be entitled to a preference of payment over the other general legacies, which are mere bounties, and it should seem that the preference will be allowed, though the bequest should exceed the value of the right or interest relinquished by the legatee; but it is requisite that the right or interest should be subsisting at the testator's death.

*Blower v. Morret*, 2 Ves. Sen. 422.

**736.** A legacy, which is in its nature general, and given to a volunteer, will not be entitled to any exemption from abatement, on the ground of its being applied to any particular object or purpose. Thus legacies of a certain sum each to executors for their care and trouble, or of sums for mourning rings, or to servants or to charities, are not to be preferred to other general legacies. And although the bequest is made in favor of a wife or child of the testator, it can claim no preference, but must abate with the rest of the general legacies.

Legacies to executors for care and trouble, etc.

*See Re Schweder's Estate* (1891), 3 Ch. 44.

**737.** An annuity charged on the personal estate is a general legacy, therefore as between annuitants and legatees there is no priority where there is a deficient estate, but both must abate proportionately, and whether an annuity is to commence immediately on the death of a testator, or at a future date, this principle will equally apply.

Annuity charged on personal estate.

*Miller v. Huddleston*, 3 Mac. & G. 513.

*Innes v. Mitchell*, 1 Phill. Ch. C. 716.

**738.** If, by the express words or fair construction of the will, the intent of the testator is clearly manifest to give one general legatee a priority over the others, that intention must be carried into effect. For instance, if a testator gives legacies to A., B. and C. with the proviso, that if the assets should fall short for the satisfaction of those legacies, A., notwithstanding, should be paid her full legacy; the abatement must be borne proportionately by the legacies of B. and C. only.

Priority expressed among general legatees.

*Marsh v. Evans*, 1 P. Williams, 668.

**739.** But the onus lies on the party seeking priority, to make out that such priority was intended by the testator, and the proof of this must be clear and conclusive.

Onus in such case.

*Miller v. Huddleston*, 3 Mac. & G. 523.



Lien on  
specific  
funds.

**740.** Where there are specific or demonstrative legacies, that is bequests of money with reference to a particular fund for their payment, and not simply a gift of the specific fund itself. In those cases legatees have such a lien upon the specific fund that they will not be obliged to abate with the general legatees.

*Tempest v. Tempest*, 20 L. J. Ch. 500.

Assets  
specifically  
bequeath-  
ed.

**741.** As long as any of the assets not specifically bequeathed remain, such as are specifically bequeathed are not to be applied in the payment of debts, although to the complete disappointment of the general legatees; but when the assets not specifically bequeathed are insufficient to pay all the debts, then the specific legatees must abate, in proportion to the value of their individual legacies.

*Fielding v. Preston*, 1 DeG. & J. 438.

**742.** A testator bequeathed "unto my sister M. J. such sum as will, together with what shall be at her credit in my books at Montreal, make \$6,000." At the time of the making of the will there was \$3,258.47 at M. J.'s credit, but subsequently the testator disposed of his business, and as part of the arrangement placed an additional sum of \$2,000 to M. J.'s credit, making the whole sum at her credit \$5,258.42; of this sum, \$3,000 was placed on a special account at interest, \$2,000 was agreed to be paid to her by the purchasers, and the balance, \$258.42, was paid in cash, and her account balanced in the books, leaving nothing at her credit. Held, that M. J.'s legacy was to be reduced by the amount of testator's debt to her at the time of his death; that what had taken place amounted to payment of the debt; and that she was entitled to the legacy of \$6,000.

*Wilkes v. Wilkes*, 1 O. R. 131.

Legacy to  
executor as  
compensa-  
tion.

**743.** Where a testator gives a legacy to his executors, expressly as a compensation for their trouble, and there is a deficiency of assets, such legacy does not in this country abate with legacies which are mere bounties,

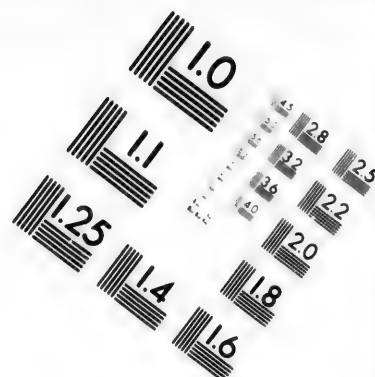
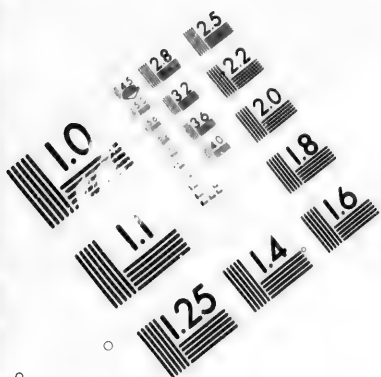
even though the legacy somewhat exceeds what the executors would otherwise have been entitled to demand.

*Anderson v. Dougall*, 15 Chy. 465.

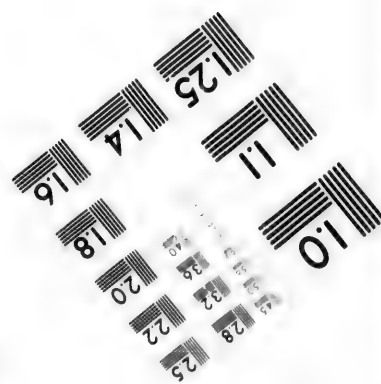
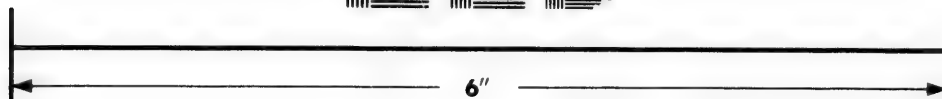
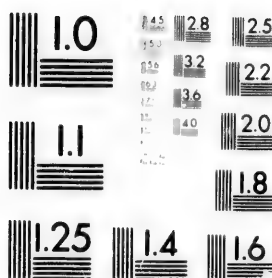
**744.** A testator out of the proceeds of his real estate and personal estate, gave to one son \$200, to another \$100, and to the third \$1,800, the balance to be equally divided between his daughters, six in number, naming them. By a codicil he revoked the bequest to the second named son of \$100, and gave an additional sum of \$100 to the first named son. The household furniture to be equally divided between his two daughters last named in the will. Held, that these legacies were specific, and not merely demonstrative, and if the fund was insufficient to pay them all, they must abate proportionately.

*Bleeker v. White*, 23 Chy. 163.

Testatrix by her will left all her property, by general words, to her executors, upon trust, inter alia; (5) to set apart \$4,500 and pay the income to the plaintiff, one of her sons; (6) to realise on all the residue of the estate, and after providing for maintenance of unsold portions, to pay \$1,400 to a second son and \$2,000 to a third, and, when all the residue should be realized, to divide it equally between these two; (7) after the death of the plaintiff to divide the \$4,500 among his children, adding, "It is my will that my son Robert (the plaintiff) is to get no benefit from my estate, except as provided in this will, the provision herein made being in lieu of any share in the insurance on my life." Two policies of insurance on her life formed part of the estate of the testatrix, and she had besides effected an insurance for \$2,000 on her life, payable to the three sons, which was in force at the time of her death. Held, that in the event of the assets not being sufficient to admit of the setting apart of the \$4,500 and the payment of the two legacies of \$1,400 and \$2,000, the \$4,500 was first to be provided for without abatement, and the other two

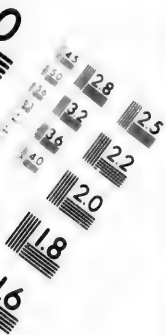


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legacies were to come out of the residue and abate in the event of a deficiency.

*King v. Yorton*, 27 O. R. 1.

Charitable  
and other  
legacies  
out of mix-  
ed fund.

**745.** Though there can be no marshalling in favour of charities, yet where charitable and other legacies are payable out of a mixed fund, the proceeds of realty, impure personalty and personalty, the charitable legacies do not fail in toto, but must abate in the proportion which the sum of the realty and impure personalty charged with charitable gifts bears to the pure personalty.

*In re Stachier*, 51 A. R. 266.

**746.** A testator by his will directed that a farm should be sold, and that his executors should "first out of the said proceeds set apart the sum of \$2,000, and invest the same in some safe security for the benefit of and for the maintenance and education of" the testator's grandson, subject to certain provisions as to payment of income and corpus, and then further directed that "out of the proceeds of the sale of the land there shall be paid the following legacies" to three daughters and a son of the testator. Held, that the general rule of equality among legatees applied, and that, there not being sufficient to pay all legacies in full, the grandson's legacy should abate proportionately.

*Lindsay v. Waldrick*, 24 A. R. 104.

(5) *The Executor's assent to a legacy.*

Executor  
must as-  
sent to  
legacy.

**747.** The whole property of the testator, as has already been shown, devolves upon his executor. It is his duty to apply it in the first place to the payment of the debts of the deceased, and he is responsible to the creditors for the satisfaction of their demands, to the extent of the whole estate, without regard to the testator's having by the will directed that a portion of it shall be applied to other purposes. Hence, as a protection to the executor, the law imposes the necessity that every

legatee, whether general or specific, and whether of chattels real or personal, must obtain the executor's assent to the legacy before his title as legatee can be complete and perfect.

Wms. p. 1225.

**748.** Hence, also, the legatee has no authority to take possession of his legacy without such assent, although the testator, by his will, expressly direct that he shall do so; for if this were permitted, a testator might appoint all his effects to be thus taken, in fraud of his creditors.

Legatee cannot take possession without.

**749.** Before such assent, however, the legatee has an inchoate right to the legacy, such as is transmissible to his own personal representatives, in case of his death before it be paid or delivered.

Legatee as inchoate right.

**750.** Again, if the testator by will forgive a debt due to him from a particular person, it is the better opinion, that the assent of the executor is necessary to give effect to the testator's intention.

Testator forgiving debt.

**751.** If without the executor's assent the legatee takes possession of the thing bequeathed to him, the executor may maintain an action of trespass or trover against him; so, although a chattel, real or personal, specifically bequeathed, be in the custody or possession of a legatee, and the assets be fully adequate to the payment of debts, he has no right to retain it in opposition to the executor; by whom, in such case, an action will lie to recover it.

Legatee taking possession without consent.

Old authorities, Wms. p. 1227.

**752.** If an executor refuses his assent without cause, he may be compelled to give it by a Court of Equity.

Refusal of consent.

**753.** With respect to what shall constitute such assent on the part of the executor, the law has for this purpose prescribed no specific form; and it may be either express or implied.

What shall constitute consent.

*Mason v. Farnell*, 12 M. & W. 674.

Must be  
unambig-  
uous.

**754.** The act or expression deemed sufficient to impart that assent should be unambiguous.

*Doe v. Harris*, 16 M. & W. 517.

May be  
presumed.

**755.** The assent of the executor may be presumed; on the principle, that in the absence of evidence, the executors shall be taken to have acted in conformity with their duty; as when executors die after the debts are paid, but before the legacies are satisfied.

May be  
upon con-  
dition.

**756.** The assent of the executor may also be upon a condition precedent, as if he should tell the legatee that he will pay the legacy, provided the assets are sufficient to answer all demands. But the condition must not be one that the executor had no authority to impose, e.g., provided the legatee will pay the executor a certain sum annually.

May be  
before pro-  
bate.

**757.** A person appointed executor may assent to a legacy before he proves the will, and even if he dies without taking probate, his assent will be effectual.

Assent of  
one of  
several.

**758.** If several executors are appointed, the assent of any one of them is sufficient; and, therefore, if there be a legacy to one of several executors, he may take it of his own assent without the others.

*Townson v. Tickell*, 3 B. & A. 40.

Assent to  
specific  
legacy.

**759.** After an assent by the executor to a specific legacy, the interest in the chattel bequeathed vests in the legatee, so that he may take proceedings to recover it, even against the executor himself.

Assent  
cannot be  
retracted.

**760.** If an executor once assent to a legacy he can never afterwards retract; and, notwithstanding a subsequent dissent, a specific legatee has a right to take the legacy, and has a lien on the assets for that specific part, and may follow them. But if the assent has not been completed by payment, in the case of a general legacy, or possession, in that of a specific one, and its recall is

not attended with injury to a third person, as to a bona fide purchaser from the legatee on the faith of such assent, it seems only reasonable, that the executor under particular circumstances, should have the power of retracting it; as where he assents upon the reasonable ground for considering that the assets are sufficient to answer all demands, but unknown debts are unexpectedly claimed, which occasion a deficiency. Moreover, if the assent has been completed by payment or possession, and afterwards debts appear, of which the executor had no previous notice, he may compel the legatee to refund.

*Doe v. Guy*, 3 East. 123.

**761.** The assent of an executor has relation to the time of the testator's death. Such assent by relation to death confirms the intermediate grant to the legatee of his legacy.

**762.** In the case of a legacy bequeathed to an executor, his assent is as necessary to a legacy's vesting in him in the capacity of legatee, as to a legacy's vesting in any other person.

**763.** His assent to his own legacy may, as well as his assent to that of another legatee, be either expressed or implied. Until he has made his election he takes the legacy as executor, though all the debts have been paid independently of such bequest.

**764.** With regard to the effect of entry by the executor into possession of a term of years bequeathed to him, the following distinction exists: Where the entire term is given to the executor, an entry will amount to an election to take as legatee. But where a sole executor, or one of several executors, takes an interest in a leasehold estate for life, or any partial interest, he must do something more than enter, in order to give assent to his legacy.

*Doe v. Sturges*, 7 Taunt. 217.



Executor  
legatee  
renouncing  
probate.

**765.** If an executor legatee renounce probate, his assent to his own legacy will be ineffectual, and if he take the thing bequeathed without the permission of the administrator cum testamento annexo, he will incur the same liabilities as any other legatee so acting.

(6) *At what time legacies are to be paid.*

One year  
allowed  
for pay-  
ment.

**766.** On the principle that the assent of an executor to a legacy is necessary, he cannot, before a competent time has elapsed, be compelled to pay it. A period fixed by the Civil Law for that purpose, which our Courts have also prescribed, and which is analogous to the Statute of Distribution, is a year from the testator's death. During which it is presumed that the executor may fully inform himself of the state of the property; but within that period he cannot be compelled to pay a legacy, even in a case where the testator directs it to be discharged within six months after his death.

*Brooke v. Lewis*, 6 Madd. 358.

Executor  
may pay  
at earlier  
date.

**767.** This allowance is merely for convenience, in order that the debts of the testator may be ascertained and the executors made acquainted with the amount of assets, so as to be able to make a proper distribution of them. However, if the state of the testator's circumstances be such as to enable the executors to discharge legacies at an earlier date they may do so.

*Gartshore v. Chalie*, 10 Ves. 13.

Legacy  
subject to  
limitation  
over.

**768.** Where a legacy is given generally subject to a limitation over upon a subsequent event, the devastating contingency will not prevent the legatee from receiving his legacy at the end of a year from the testator's death, and he is not bound to give security for repayment of the money in case the event should happen.

*Faulkes v. Gray*, 18 Ves. 131.

When an-  
nuity be-  
gins.

**769.** If an annuity be given by will it commences immediately from the testator's death, and therefore the first payment must be made at the expiration of a year next after that event.

*Stamper v. Pickering* 9 Sim. 176.

**770.** Where an annuity is expressly directed to commence within the year, as at the first quarter day after the testator's death; or where an annuity is given with the direction that it shall be paid monthly, the money will be due at the first quarter day, or at the end of the first month after the testator's death, although not payable by the executor till the end of the year.

*Storer v. Prestage*, 3 Madd. 168.

**771.** Where there is a bequest of money to or in trust for legatees absolutely, but with the direction for the enjoyment or application of the money in a particular mode for their benefit, as where it is given to purchase an annuity for the legatee, or to place him out apprentice, or to enable him to take holy orders, or towards "helping him to purchase a country residence," the legatees will be entitled to receive the capital immediately, regardless of the particular mode directed for the enjoyment or application.

See *Re Mabbitt* (1891), 1 Ch. 707.

**772.** Where a testator gives an annuity to A. for life, and directs the first payment to be made within one month from his, the testator's death, the annuity commences from the death of the testator, and though the first year's payment is due at the appointed time, the payment for the second year does not become due till the end of the year.

**773.** Where a testator gives an annuity to A. for life, payable quarterly, the first payment to be made within eighteen months after his death, the annuity does not commence until fifteen months from the death of the testator.

*Irrin v. Ironmonger*, 2 Russ. & M. 531.

**774.** If an annuity is given, the first payment is paid at the end of the year from the death; but if a legacy is given for life with remainder over, no interest is

due till the end of two years. It is only interest on the legacy, and till the legacy is payable there is no fund to produce the interest.

*Gibson v. Holt*, 7 Ves. 97.

Bequest of  
residue  
carries in  
course

**775.** With respect to a bequest of the residue of a personal estate for life with remainder over, the person taking the residue for life is entitled to the income in some shape or other from the death of the testator. Where the testator simply bequeaths all the residue of his personal estate for life, with remainder over, without any direction to invest it in any particular manner, as between the tenant for life and the remainderman, where the residue consists in part or wholly of property in its nature perishable and daily wearing out, the tenant for life will not be entitled to the annual produce which the property annually wearing out is actually making; but to interest from the death on the estimated value. The rule is that the tenant for life is to be allowed as from the death of the testator, the income of such parts of the personal estate as were at his death and have remained in a state of investment which ought to be recognized and allowed to be continued by a Court of Equity.

*Howe v. Lord Dartmouth*, 7 Ves. 137.

Portions  
of estate  
not in-  
vested.

**776.** With regard to those parts of a personal estate which neither were at the testator's death, nor have since been in such a state of investment as ought to be recognized and allowed to be continued by the Court, they must be valued at a period of one year after his death, and interest from his death on the value so taken must be paid to the tenant for life.

*Meyer v. Simonsen*, 5 DeG. & Sm. 723.

Bequest to  
tenant for  
life speci-  
fic.

**777.** Where the bequest to the tenant for life is specific, the legatee in remainder is not entitled to have the property converted; notwithstanding, by reason of its being a decreasing fund, the legacies over may altogether fail.

*Bethune v. Kennedy*, 1 My. & Cr. 114.

**778.** If personal chattels are bequeathed to A. <sup>Chattels to A.</sup> for life and remainder to B., A. will be entitled to the <sup>for life remainder to B.</sup> possession of the goods upon signing and delivering to the executor an inventory of them admitting their receipt expressing that he is entitled to them for life, and that afterwards they belong to the person in remainder. No security is required unless a case of danger is shown.

*Conduitt v. Raine*, 1 Goll. 285.

**779.** A gift for life of things *quae ipso usu con-* <sup>Gift for life of things consumable</sup> sumuntur as corn and wine, if specific, is an absolute gift of the property, but if residuary, the things must be sold and the interest of the produce paid to the legatee for life.

*Porter v. Tournay*, 3 Ves. 314.

**780.** Farming stock and implements of husbandry are not things *quae ipso usu consumuntur*, within <sup>Farming stock and implements</sup> this rule.

*Groves v. Wright*, 2 Kay & J. 347.

**781.** Where the legatee is an infant, the executor <sup>Payment where legatee is infant</sup> cannot safely pay him or any other person on his account until he attains twenty-one, unless under the provisions of the Statute 36 Geo. III. cap. 52, s. 32.

See paragraph 791 post.

**782.** If a legacy be given to A. to be paid at <sup>Intermediate interest not due period of</sup> twenty-one, and the intermediate interest is not given, and A. dies before that period, his representative must wait for the money until the time when A., if living, would have attained twenty-one. But where interest is given during the minority, and the legatee dies under age, his executors or administrators will be entitled immediately on his death.

See *Gawler v. Standerwick*, 2 Cox 15 (charged on land, difference).

**783.** Again, in case a legacy be left to A. at <sup>Legacy to A. at 21 or to B.</sup> twenty-one, and if he die before that period, then to B.; and A. dies before he attains his age, B. shall be entitled immediately, for he does not claim under A., but the

devise is a distinct substantive bequest to take effect on the contingency of A.'s dying during his minority.

*Feltham v. Feltham*, 2 P. Wms. 271.

Gifts vested in children.

**784.** A testator by his will directed that his estate should be divided upon his youngest child attaining the age of twenty-one years, the income of the estate in the meantime to be paid to the wife, for the benefit of herself and the children. The only gift was contained in the direction to pay and divide upon the arrival of the period of distribution.

Held, that the gift vested prior to the enjoyment of the corpus of the estate, which was only postponed in order to provide for the maintenance of the family.

Held, also, that the gift vested in each child upon attaining the age of twenty-one, and that no child who did not attain that age was intended to take a share of the corpus.

*Re Douglas*, 22 O. R. 553.

Postponement of payment.

**785.** Where a testator gives a legatee an absolute vested interest in a defined fund, so that according to the ordinary rule he would be entitled to receive it on attaining twenty-one; but, by the terms of the will, payment is postponed to a subsequent period, e.g., till the legatee attains the age of twenty-five, the Court will, nevertheless, order payment on his attaining twenty-one, for at that age he has the power of charging or selling or assigning it, and the Court will not subject him to the disadvantage of raising money by these means when the thing is absolutely his own. So, although a legacy is directed to accumulate for a certain period, e.g., until the legatee attains the age of thirty; yet if he has an absolute indefeasible interest in the legacy, he may require payment the moment he is competent by reason of having attained twenty-one to give a valid discharge.

*Gott v. Wairne*, 3 C. D. 278.

**786.** Although legatees are not entitled in any case to receive their legacies before the day of payment arrives, yet they are entitled to go into the High Court of Justice and pray that a sufficient sum be set apart to answer the legacy when it shall become due, but not so if it is to be raised out of real estate.

*Gardner v. Standerwick*, 2 Cox, 15.

**787.** When a fund has been appropriated for the payment of an annuity given by a will, a question may arise whether the legatee is to suffer the loss consequent upon the partial failure of the fund. Where the annuity is a charge upon the whole personal estate, the executor cannot affect the legatee's right to the entire annuity by any appropriation.

*Gordon v. Boeden*, 6 Madd. 342.

**788.** Where the existence and amount of a testator's debts are contingent and depend upon the result of legal proceedings before a foreign tribunal, which are not likely to be speedily settled, the Court in administering his assets will not be induced by that circumstance to direct an appropriation of the fund in Court to answer pecuniary legacies subject to such demands as creditors may eventually establish.

*Thomas v. Montgomery*, 1 Russ. & M. 729.

(7) *To whom legacies are to be paid.*

**789.** An executor must be careful to pay legacies into the hands of those who have authority to receive them. If a legacy is given to A. to be divided between himself and family, and the executor pays the legacy to A., it is a good payment to discharge the executor.

*Robison v. Tickell*, 8 Ves. 142.

**790.** It is a general rule that where a legatee is an infant, and would be entitled to receive the legacy if he were of age, the executor is not justified in paying it

When leg-  
atees en-  
titled to  
apply to  
Court.

Loss by  
partial  
failure of  
funds.

Testators  
debts de-  
pending  
upon for-  
eign pro-  
ceedings.

Executors  
must pay  
legacies to  
proper  
parties.

Where  
legatee is  
infant.

either to the infant or to the father, or any other relation of the infant on his account without the sanction of the Court.

*Dagley v. Talferry*, 1 P. Wms. 285.

**791.** By Statute 36 Geo. III., cap. 52, s. 32:

Where by reason of the infancy or absence beyond the seas of any person entitled to any legacy or to the residue of any personal estate, or any part thereof chargeable with duty by virtue of this Act, the person or persons having or taking the burden of any will or testamentary instrument, or the administration of such personal estate, cannot pay such legacy or some part thereof, although he may have effects for that purpose, or cannot pay such residue or some part thereof, although he may have the same or some part thereof in his hands, it shall be lawful for such person to pay such legacy or residue, or any part thereof, or any sum of money on account thereof, into the Bank of England, with the privity of the accountant of the Court of Chancery, to be placed to the account of the person for whose benefit the same shall be so paid.

**792.** An executor is not bound to pay the legacy into Court till the expiration of a year from the testator's death.

Advances  
on account  
of main-  
tenance.

How far an executor can make advances for maintenance on account of a legacy will be discussed later in the chapter dealing with the duties and powers relating to the children of the testator.

Presump-  
tion of  
death of  
legatee.

**793.** Where a legacy is given to a legatee who has been abroad and not heard of for a long time, the Court may, in proper case, presume him to be dead. The executor may avoid all responsibility by paying the amount into Court.

Notice of  
charge on  
legacy.

**794.** An executor who receives notice that a legatee has charged his legacy is bound to withhold all further payment to him, and the executor can create no new charges or rights of set-off after that time.

*Stephens v. Venables*, 30 Beav. 625.

**795.** A power is sometimes given to trustees or executors to appoint a certain sum of money to several objects in such manner that none of the objects can be excluded by the donee of the power from a share of such property, as "to all and every child or children" of the testator, or to any other person; in such case it would be a good legal execution of the power if the greater part of the fund be given to one of the children and the residue, however small, for example \$1, be distributed among the rest. Courts of Equity at a very early period assumed in such cases the power of controlling such appointments, which were merely illusory.

**796.** Under the Judicature Act, as equity now prevails, in case of conflict such appointments will be subject to the jurisdiction of the Court.

(8) *Interest upon legacies.*

**797.** Specific legacies are considered as separated from the general estate and appropriated at the time of the testator's death, and consequently from that period whatever produce accrues upon them, and nothing more or less, belongs to the legatee. Therefore, where there is a specific legacy of stock, the dividends belong to the legatee from the death of the testator, and it is immaterial whether the enjoyment of the principal is postponed by the testator or not.

See *Turner v. Buck*, L. R. 18 Eq. 301.

**798.** General legacies in their nature carry interest, which must be computed from the time at which the principal is actually due and payable. In a case where the testator has not fixed any time of payment, the executor is by law allowed one year from the testator's death to ascertain and settle his affairs, at the end of which time the Court, for the sake of general convenience, presumes the personal estate to have been reduced into possession. Upon that ground interest is payable from that time, unless some other period is fixed by the will.

*Wood v. Penwyre*, 13 Ves. 333.



Legacy in satisfaction of debt.

**799.** If a legacy is decreed to be a satisfaction of a debt, the Court allows interest from the death of the testator.

*Clarke v. Seirell*, 3 Atk. 99.

Legacy by parent.

**800.** In the case of a legacy given to a child by a parent, or one in loco parentis, whether by way of portion or not, the Court will give interest from the death to create a provision for its maintenance.

*Wickett v. Dalry*, 3 Ves. 13.

Interest commences at end of year.

**801.** After the expiration of the year from the death of the testator the legacy will carry interest, although payment be from the condition of the estate impracticable, and although the assets have been unproductive.

*Fisher v. Brierley*, 30 Beav. 268.

Annuity interest on.

**802.** An annuity bestowed by will without mentioning any time of payment is considered as commencing from the death of the testator, and the first payment is due at the expiration of one year, from which period interest may be claimed in cases where it is allowed at all.

Forfeiture by non-payment.

**803.** Generally speaking the Court has refused any application for interest upon the arrears of annuities given by will, unless in case where the person charged with the payment of the annuity has at law incurred a forfeiture by non-payment against which he is obliged to seek relief in Equity. There no assistance will be given him by the Court except upon terms of Equity, namely:—By consenting to pay the grantee of the annuity the arrears due with interest.

*Tone v. Brown*, 5 H. L. C. 578.

Time of payment fixed by testator.

**804.** Where the time of payment is fixed by the testator, the general rule is that the legacies will not carry interest before the arrival of the appointed time, as, for instance, when the legatee shall attain 21, nor will it make any difference that the legacy is vested.

*Varley v. Winn*, 2 Kay & J. 700.

**805.** Where, however, a fund is severed immediately from the testator's death for the benefit of the objects of the gift, not only is the gift vested, but carries interest, though the only gift is in a direction to pay it at a future time. Fund severed on death.

*Dundas v. Wolfe Murray*, 1 Hemm. & M. 425.

**806.** If the testator is the parent or in loco parentis of the legatee, whether the legacy be vested or contingent, if the legatee be not an adult, interest on the legacy is allowed as maintenance from the time of the death of the testator if there is no other provision for that purpose, the Court will determine the quantum of allowance, where the legatee is the child of the testator, and the specific legacy is given by the Will for maintenance, no greater allowance can be claimed for that purpose, although it be less than the usual rate of interest upon the legacy. Interest when allowed as maintenance.

*Re George*, 5 C. D. 857.

**807.** This exception is not extended in favor of nephews and nieces nor of grandchildren unless the testator was in loco parentis.

**808.** Where the payment of a legacy is postponed by a testator to a future period, as until the legatee attains 21, and the will directs that when that period arrives the payment shall be made with interest, the legacy shall bear interest only from the end of the year of the testator's death. Payment of legacy postponed.

*Knight v. Knight*, 2 Sim. & Stu. 792.

**809.** Where a vested legacy, either particular or residuary, is given to an infant without appointing any time for payment, and it is subject to a limitation over upon a divesting contingency, which takes effect as where the legacy is given upon condition to divest it upon the death of the legatee under 21, and he dies under that age, yet, as the legacy was payable at the end of the year Vested legacy to infant.

after the testators death, his executor or administrator and not the legatee over will be entitled to the interest which accrued on the legacy during the infant legatee's life.

*Webb v. Kelly*, 9 Sim. 469.

Gift of residue where bequest vests immediately.

**810.** Where there is a gift of a residue and the bequest is such as to vest immediately, but is not payable until the legatee shall attain 21, and there is a bequest over divesting the legacy in case he dies under that age, in that case also, although the legatee dies under 21, his personal representative is entitled to the interest which became due during the legatee's life.

*Skey v. Barnes*, 3 Meriv. 345.

Contingent legacies.

**811.** The rule is otherwise with respect to contingent legacies. So, where a particular legacy, though vested, is not payable till 21, and nothing is said in the will that shows the testator's intention to give interest in the meantime, in such case, if the legacy be divested by the death of the legatee before attaining 21, his personal representatives cannot claim the interest accruing until his death.

Particular legacy.

**812.** But where a particular legacy is given, even contingent upon the event of the legatee attaining 21, with interest in the meantime, and the legatee dies before that age, the arrears of interest up to the time of his death will, it seems, belong to his personal representatives.

*Errington v. Chapman*, 12 Ves. 20.

Interest to be computed on principal.

**813.** Interest upon legacies is to be computed on the principal only, and not upon the principal and interest. Under particular circumstances the Court will allow the legatee compound interest, as where there is an express direction in the will that the executor should lay out the fund to accumulate and he neglects to do so.

*Raphael v. Boehm*, 11 Ves. 92.

**814.** A testatrix by her will directed that a leg-<sup>Legacy out of sale of</sup>acy should be paid out of the proceeds of the sale of lands, lands, and that the lands should be sold at any time within two years after her death.

Held, that interest upon the legacy should be allowed from the day when the two years expired; or, if the lands were sooner sold, from the date of sale.

*Re Robinson*, 22 O. R. 438

**815.** As the land was directed to be sold within three years from the testator's death, the legacies bore interest from the date when the lands should have been sold.

*McMylor v Lynch*, 24 O. R. 632.

**816.** Testator by his will left the income of his estate to his wife for life, and directed that after her death it should be disposed of as set out in a codicil not to be opened until after her death. By the codicil he disposed of all his estate among his children, giving to two of them, after the death of his wife, a certain property which in reality belonged to her. His widow, without proving the will, received all the income of the estate for five years, after the lapse of which the will and codicil were proved. She then elected against the will.

Held, that her election related back to, and she was liable to account from, the date of the testator's death; but, as she was not called upon to elect until this action was brought, she would not be charged with interest in the meantime.

*Davis v. Davis*, 27 O. R. 532.

Interest on Legacies.

*Toomey v. Tracey*, 4 O. R. 708.

(9) *In what currency legacies are to be paid.*

**817.** Where legacies are given generally it will be presumed that the testator intended that they should be paid in the money of the country in which he was domiciled, and the will was made without regard to the currency of the place where the legatees reside.

*Yates v. Madden*, 16 Sim. 613.

K.E.A.—18

(10) *The payment or delivery of specific legacies.*

Before  
Wills Act.

**819.** Before the Wills Act the general rule was that in order to confine a bequest to the date of the will the expressions must refer unequivocally to the property which the testator then had, otherwise they would not be allowed to have that effect. Thus, if the bequest were general, as of all the testator's goods in a particular house or place, whatever personal chattels were found there at the time of his death would pass though not there at the date of the will.

*Beaufort v. Dundonald*, 2 Vern. 739.

Since  
Wills Act.

**820.** By section 26 of the Wills Act, the will of every person who has died since the 31st of December, 1868, or afterwards, is construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will.

Articles  
specifically  
bequeath-  
ed.

**821.** It is the duty of executors as far as possible to preserve articles specifically bequeathed according to the testators wish, and unless compelled they ought not to apply them to the payment of debts. It is also the duty of the executors to get in all the testator's estate, whether specifically bequeathed or otherwise and the expense incurred in so doing must be paid out of the general estate as part of the expense of the administration.

*Clive v. Clive*, Kay, 600.

Who has  
right of  
selection.

**822.** If a testator dying solvent bequeaths to A. a given number of articles forming part of a stock of articles of the same description, as, for instance, if he has twenty horses in his stable, and bequeaths six of them, the legatee and not the executor has the right of selection.

*Tapley v. Eagleton*, 12 C. D. 683.

**823.** If a testator directs his executor to deliver a specified packet, part of the property of the deceased, to a particular legatee, unopened, the executor cannot consistently with his duty comply with this direction.

Unopened packet.

*Pelham v. Newton*, 2 Cas. Temp. Lee.

(11) *Election.*

**824.** It is a principle of Equity that a person who accepts a benefit under an instrument must adopt the whole, giving full effect to its provisions, and renouncing every right inconsistent with it. If, therefore, a testator assumes to dispose of property belonging to A., and devises to A. other lands, or bequeaths to him a legacy by the same will, A. will not be permitted to keep his own estate and enjoy at the same time the fruits of the devise or the bequest made in his favour; but must elect whether he will part with his own estate and accept the provisions of the will, or continue in the enjoyment of his own property and reject that bequeathed.

Principle of election.

*Wollaston v. King*, 8 L. R. Eq. 165.

**825.** The testator need not be aware that the property of which he undertakes to dispose is not his own. The obligation will be equally imposed on the legatee, although the testator proceeded on an erroneous supposition that both the subjects of bequest were absolutely at his own disposal. The intention of the testator to dispose of property which is not his own should be clear, and must appear upon the face of the will for parol evidence of intention is inadmissible for the purpose of showing it.

Testator erroneously assuming to own property.

*Dillon v. Parker*, Cl. & F. 303.

**826.** Where the provisions of a will are absolutely inconsistent with the widow's claims of dower, the widow must make her election.

**827.** Where a testator makes two bequests to the same person, one of which happens to be onerous, and the other beneficial the legatee will not be allowed to reject one and retain the other. In such cases it is a

Testator making two bequests to same person.

question of the intention of the testator to be gathered from the will, whether the legatee must elect to take all or none of the gifts in the will, or whether he may accept the beneficial gift and repudiate that which is burdensome. The party bound to elect is entitled to first ascertain the value of the funds. An election under a misconception of the extent of claims on the fund elected is not conclusive.

*Dillon v. Parker*, 1 Swanst. 332.

(12) *Refunding legacies.*

Refunding legacies.

**828.** Under certain circumstances legatees are bound to refund their legacies or a rateable part of them.

**829.** Whenever an executor pays a legacy the presumption is that he has sufficient to pay all legacies, and the Court will oblige him, if solvent, to pay the rest, and not permit him to bring a bill to compel the legatee whom he voluntarily paid to refund.

*Orr v. Katmes*, 2 Ves. Sen. 194.

Legacy paid in suit.

**830.** But where the payment of a legacy is under compulsion of a suit, he is entitled to compel the legatee to refund in case of a deficiency of assets.

*Noel v. Robinson*, 1 Vern. 94.

Legatees compelled to refund.

**831.** Again, if the executor pays away the assets in legacies, and afterwards debts appear of which he did not have previous notice, and which he is obliged to discharge he may compel the legatees to refund.

*Doe v. Guy*, 3 East, 120.

Unsatisfied creditor may compel legatee to refund.

**832.** Where the testator's funds at the time of his death are not sufficient to pay both debts and legacies, it is clear that an unsatisfied creditor can compel a satisfied legatee to refund, where the legacy was paid to him voluntarily or by compulsion. He has the same right, although the testator's funds at the time of his death were sufficient to pay both debts and legacies, and although the assets were handed over to the legatee by the personal representatives in ignorance of the creditor's demands.

*Marsh v. Russell*, 3 M. & Cr. 31.

**833.** If the assets were originally sufficient to satisfy all the legacies, and afterwards by the wasting of the executor there is a deficiency, an unsatisfied legatee cannot oblige a satisfied one to refund whether the legacies were paid him with or without suit; but if the assets were not originally sufficient to pay all the legatees, and one legatee receives his legacy in full, in that case the unsatisfied legatees may compel the one so paid to refund. In no case where the executor is solvent can an unsatisfied legatee maintain a suit against another who has been satisfied, because the remedy is in the first place against the executor who by paying the one legacy has admitted assets to pay all.

Not so if assets originally sufficient.

*Orr v. Kaimes*, 2 Ves. Sen. 194.

**834.** If a legacy has been erroneously paid to a legatee who has no further property in the estate, in recalling that payment the rule of the Court is not to charge interest. But, if the legatee is entitled to another fund making interest in the hands of the Court, justice must be done out of his share.

Interest not charged.

*Jervis v. Wolferstan*, L. R. 18 Eq. 18.

(13) *Charitable Bequests.*

**835.** All bequests to superstitious uses are illegal and void, but bequests to charitable uses are only legal and valid but are in some measure favoured by our law.

Superstitious uses.

Wms. p. 901.

**836.** Where a bequest, although not within the statute, is merely void as being to superstitious uses, the king shall not take it beneficially, yet, if it be of a charitable nature, it shall not be so far void as that it shall result to the personal representative of the testator; but the king, under his sign manual directed to the attorney-general, may order to what purpose it shall be disposed.

Difference between superstitious and charitable uses.

Cases cited, Wms. p. 904.



Voided  
bequests  
vested in  
Crown.

**837.** Bequests made in favor of uses apriised within Statute 1, Ed. VI., by it vest in the Crown beneficially.

*De Themmines v. De Bonneval*, 5 Russ. 288.

Mortmain  
Act 9 Geo.  
II., c. 36.

**838.** With respect to bequests to charitable uses, testamentary dispositions to charitable or public purposes of money or other personal estate not connected with real property are valid, but with regard to bequests of land, or affecting land, the Statute 9 Geo. II., c. 36, known as the Mortmain Act, enacts as follows:

“That from and after the 24th June, 1736, no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or any ways conveyed or settled to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or encumbered by any person or persons whatsoever, in trust, or for the benefit of any charitable uses whatsoever, unless such gift, etc., of any such lands, etc. (other than stocks in the public funds), be and be made by deed indented, sealed and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of such donor or grantor, including the days of the execution and death, and be enrolled in his Majesty's High Court of Chancery within six calendar months next after the execution thereof; and unless such stock be transferred in the public books usually kept for the transfer of stocks, six calendar months at least before the death of such donor or grantor, including the days of such transfer and death, and unless the same be made to take effect in possession for the charitable use intended, immediately from the making thereof, and be

without any power of revocation, reservation, trust, condition, limitation, clause or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him."

**839.** The second section provides that such limitations, etc., shall not be construed to extend to any purchase or transfer made for valuable consideration. The third section then enacts, "That all gifts, grants, conveyances, appointments, assurances, transfers and settlements, whatsoever, of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or encumbrance affecting, or to affect any lands, etc., etc., to or in trust for any charitable uses whatsoever, which shall at any time from and after, etc., etc., be made in any other manner or form than by this Act, is directed and appointed, shall be absolutely, and to all intents and purposes, null and void."

**840.** Although this statute imposes no restriction upon anyone from leaving a sum of money, or any other estate purely personal, to charitable uses, yet in the construction of it, it has been adjudged, that not only devises of land, and bequests of money to be invested in land are void, but also such bequests as in any manner affect or relate to interests in real property. Thus, bequests of money charged on real estate, or of money to arise from the sale of real estate, or the proceeds of growing crops, bequests of terms for years, or of money due on mortgage, are within the statute, and void. So, where a testator, who has given his personal estate to charitable uses, contracts to sell real estate, but the sale is not completed in his lifetime, his lien upon the estate for the amount of the purchase money is an interest in land within the statute, and the purchase money will not pass by his will to the charity. So it has been held that shares in joint-stock companies, as canal, dock, railway, water-works, gas-light, and banking companies, and the like, are not within the statute,

notwithstanding real estate forms part of their property. And so of a debenture or bond (not amounting to a mortgage) given by such a company to secure a debt.

*Bunting v. Marriott*, 19 Beav. 163.

Gifts to  
erect  
schools,  
etc., void.

**§41.** The statute having in terms prohibited bequests of money to be laid out in the purchase of land for any charitable use, it has been established that a gift to erect a school, or almshouses, or other buildings of that kind, is, generally speaking, void, because it involves an express direction to purchase land for that purpose.

*Sinnett v. Herbert*, 7 L. R. Ch. App. 232.

Gifts to  
improve  
buildings  
already  
existing.

**§42.** But although a bequest of money to exonerate lands in mortmain is within the statute, a bequest of money to be applied simply in the amelioration of lands in mortmain, or for building upon them, or repairing buildings already erected, is not within the statute. The gift is only void where from its nature the money must necessarily be laid out in buying land, or for other purposes obnoxious to the Law of Mortmain. If there is a discretionary power in the trustees the lawful bequest shall be preserved and take effect.

Cases cited, Wms. p. 915.

Charitable  
uses 43  
Eliz. c. 4.

**§43.** In the Stat. 43 Eliz. cap. 4, gifts for relief of aged, impotent, and poor people, for maintenance of sick and maimed soldiers and mariners, for ease of poor inhabitants concerning payment of taxes, for aid of young tradesmen, handicraftsmen, and persons decayed, for relief, stock and maintenance of houses of correction, for marriages of poor maids, for education and preferment of orphans, for schools of learning, free schools, and scholars in universities, for relief or redemption of prisoners or captives, for repair of bridges, ports, havens, causeways, churches, seabanks, and highways, are enumerated as charitable uses. Bequests to any of the purposes specified in the last-mentioned statute, or to any purpose of a similar nature, are considered as bequests to charitable uses, within the Statute of Mortmain.

**844.** Thus not only bequests for the education or relief of the poor, as by means of schools or hospitals, or to the poor inhabitants, or to the widows and children of the seamen belonging to a particular place, but also all bequests for public purposes, whether local or general.

*Attorney-General v. Corporation of Shrewsbury*, 6 Beav. 220.

**845.** In cases where there is a bequest to particular legatees to which the statute does not apply, accompanied by a disposition void by the operation of the statute; in these cases the rule is, that if the two objects are not inseparably blended, the bequest in favor of the unobjectionable purpose will be supported, although the charitable disposition shall fail; but if the unobjectionable bequest be so mixed up with the purpose of the charity, as to be dependent upon it, the bequest must be considered indivisible and void.

Blended legacies.

*Coz v. Davies*, 7 C. D. 204.

**846.** A gift over to take effect if the previous gift should be adjudged void by the Law of Mortmain is valid.

*Hall v. Warren*, 9 H. L. 420.

**847.** Purposes of liberality and benevolence, or private charities, do not amount to charitable uses in the sense in which that expression is used in the Courts. Thus a bequest in trust for such objects of benevolence and liberality as the trustee in his own discretion shall most approve, is not a legacy to charitable uses.

Gift for benevolent object.

*Morice v. Bp. of Durham*, 10 Ves. 522.

**848.** Where a charitable purpose (in the technical sense) is expressed, however generally, the bequest shall not fail on account of the uncertainty or failure of the object; but the particular mode of application will be directed by the High Court of Justice.

Court will administer.

Cases cited, Wms. p. 924.

Legacy to  
superstitious  
uses,

**849.** A legacy to a superstitious use is explained in *Elmsley v. Madden*, 18 Chy. 386, as a legacy which is intended to promote some doctrine contrary to law. Such a legacy is void. The statute which originally prohibited this species of legacy was 1 Edw. VI. c. 14, but in the case cited of *Elmsley v. Madden*, that statute was declared inapplicable to this Province. In that case a bequest by a member of the Roman Catholic Church of a sum of money for the purpose of paying for masses for his soul was upheld. In England as late as 1880 such a bequest was held void. (*Re Fleetwood*, 15 Ch. D. 596.) An Ontario instance of a bequest being held void on the ground of its being subversive of Christianity is furnished by the case of *Kinsey v. Kinsey*, 26 O. R. 99, where a bequest for the promotion of free thought and free speech in the Province of Ontario was set aside.

Law in  
Ontario.  
R. S. O.  
1897, c. 112.

**850.** As to wills of testators dying before the 14th day of April, 1892, the Statute of Mortmain remains in force and the law stated in above paragraph continues. But as to wills of testators dying on and after the 14th day of April, 1892, the statute R. S. O. 112, known as The Mortmain and Charitable Uses Act applies.

**851.** This Act was considered in the case of *Manning v. Robinson*, 29 O. R. 485, and it was there pointed out that section 8 is not in any of the Imperial Acts, even in 54 & 55 Vict. c. 73, on which our own Act is based.

"Land,"  
meaning of

3. "Land" in this Act shall include tenements and hereditaments, corporeal and incorporeal, of any tenure; but not money secured on land or other personal estate arising from or connected with land. Ont. Stats. 1892, c. 20, s. 3.

Land de-  
vised to  
charity to  
be sold.

4. Land may be devised by will to or for the benefit of any charitable use, but, except as hereinafter provided, such land shall, notwithstanding anything in the will contained to the contrary, be sold within two years from the death of the testator, or such extended period as may be determined by the High Court, or a Judge thereof in Chambers. Ont. Stats. 1892, c. 20, s. 6.

6. Any personal estate by will directed to be laid out in the purchase of land to or for the benefit of any charitable uses, shall, except as hereinafter provided, be held to or for the benefit of the charitable uses as though there had been no direction to lay it out in the purchase of land. *Ont. Stats. 1892, c. 20, s. 6.*

8. Money charged or secured on land or other personal estate arising from or connected with land, shall not be deemed to be subject to the provisions of the statutes known as the Statutes of Mortmain, or of charitable uses as respects the will of a person dying on or after the 14th day of April, 1892, or as respects any other grant or gift made after the said date. *Ont. Stats. 1892, c. 20, s. 6.*

**852.** The testator gave the trustees of his will a discretion as to how the fund was to be used for the advancement of the cause he had in view, and where that is the case, the authorities shew it is a reason for not directing a scheme.

*Phelps v. Lord, 25 O. R. 260.*

Charitable bequest.

*Gillies v. McConachie, 3 O. R. 203.*

Mortmain.

*Macdonell v. Purcell, 23 S. C. R. 101.*

*Anderson v. Todd, 2 U. C. R. 82.*

*Whitby v. Loscombe, 23 Ch. 1.*

*Tyrrell v. Senior, 20 A. R. 156.*

*McMylor v. Lynch, 24 O. R. 632.*

*Kinsey v. Kinsey, 26 O. R. 99.*

*Pringle v. Napanee, 43 U. C. R. 285 followed.*

*Sills v. Warner, 27 O. R. 266.*

*McDiarmid v. Hughes, 16 O. R. 576.*

*Smith v. Methodist Church, 16 O. R. 199.*

*Becher v. Hoare, 8 O. R. 328.*

*Walker v. Murray, 5 O. R. 638.*

*Labatt v. Campbell, 7 O. R. 250.*

*Toomey v. Tracey, 4 O. R. 708.*

*Murray v. Malloy, 10 O. R. 46.*

*Farewell v. Farewell, 22 O. R. 573.*

Effect of codicils on Mortmain.

*Holmes v. Murray, 13 O. R. 756.*

## CHAPTER V.

## CONSTRUCTION SECTIONS OF WILLS ACT.

Executor  
must dis-  
pose of  
land.

**853.** Where, as is usually the case, the estate of a deceased person includes both real and personal property, the executor of a will is bound to carry out the testator's intentions with regard to the land as well as to the personalty. The questions which arise must be determined by a construction of the will.

Dev. of  
Estates  
Act.

**854.** Where there is an intestacy, the devolution of real estate is provided for by statute as will presently be seen. But since the Devolution of Estates Act, both real and personal property devolve on the personal representative. Therefore, in case of an administration with will annexed, real as well as personal property will devolve on the administrator—the former subject to the will, the latter under the statute.

Rules for  
construc-  
tion of  
wills re-  
lating to  
lands.

**855.** Hence so long as executors and administrators had only to deal with personal property, treatises relating to their powers and duties were properly confined to the subject of personal property. Under the present state of the law, the subject cannot be said to be complete without some exposition of the rules adopted for the construction of wills relating to real estate.

**856.** A glance at the large volumes devoted to this subject will shew that to attempt to include even their gist in these pages would be impossible. All that can be done is to shew that certain difficulties have been removed by statute, explain what those difficulties were, and state the statutory solution. It will be found that many of the difficulties which have been removed are those more commonly occurring. These statutory rules are known

as the Construction Sections of the Wills' Act, R. S. O. 1897, chapter 128 (sections 26 to 38 inclusive).

25. No conveyance or other act made or done subsequently to the execution of a will, of or relating to any real or personal estate therein comprised, except an act by which such will is revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator had power to dispose of by will at the time of his death. R. S. O. 1887, c. 109, s. 25.

No act as to property named in a will to prevent operation of the will as to any interest left in testator. Imp. Act 1 V. c. 26 s. 23.

**857.** By section 8—section 25 does not apply to the will of any person who died before the 1st of January, 1869, but applies to the will of every person who has died since the 31st December, 1868.

26. (1) Every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will. R. S. O. 1887, c. 109, s. 26.

Imp. Act 1 V. c. 26 s. 24.

(2) This section shall apply to the will of a married woman made during coverture, whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or re-published after the death of her husband. Ont. Acts, 1897, c. 22, s. 2.

Imp. Act 56-57 V. c. 63 s. 3.

**858.** By section 8—section 26 also does not apply to the will of any person who died before the 1st of January, 1869, but applies to the will of every person who has died since the 31st December, 1868.

**859.** In wills made before the 1st of January, 1869, every devise of freehold lands speaks from the date of the will, and describes only the land then belonging to the testator.

**860.** A codicil republishes the will so as to make the will speak from the date of the codicil, and include lands acquired before the date of the codicil. But a codicil does not revive a legacy revoked, adeemed or satisfied.

Codicil republishes will.

*Poey's v. Mansfield*, 3 Myl. & Cr. 376.



Bequests  
of lease-  
holds.

**861.** A bequest of leaseholds speaks from the date of the will, and does not include after acquired leaseholds nor a renewed lease.

*James v. Dean*, 11 Ves. 383.

**862.** A bequest of all my personal estate or residue of my personal estate, means the personal estate existing at the death of the testator.

**863.** Under section 26 in wills made after the 1st of January, 1869, descriptions of real or personal estate refer to and comprise the property answering to the description at the death of the testator.

Lands con-  
tracted to  
be pur-  
chased.

**864.** With respect to lands contracted to be purchased by testator (including lands contracted to be purchased after the date of will) a general devise of testator's lands includes lands contracted to be purchased by testator, but not actually conveyed.

*Acherley v. Vernon*, 10 Mod. 518.

Lands con-  
tracted to  
be sold.

**865.** Lands contracted to be sold are lands of which the testator was a trustee, and the legal estate in them passes to the executor in trust for the purchaser, The devisee will not be entitled to the purchase money.

*Ross v. Ross*, 20 Ch. 203.

General  
powers of  
appoint-  
ment.

**866.** As regards general powers of appointment the effect of the 26th and the 29th sections of the Act is to make all general devises and bequests operate as an execution by anticipation of all general powers vested in the testator at the time of his death, although created by an instrument subsequent in date to the will unless the language of the power be such as to forbid its being exercised by anticipation.

Special  
powers of  
appoint-  
ment.

**867.** Even special powers of appointment created after the date of the will may be exercised by a bequest contained in the will, if the bequest contains a sufficient description of the particular property afterwards made

the subject of the power to show that the testator had the subject of the power in view, which is the test of execution as regards special powers.

*Stillman v. Weedon*, 16 Sim. 26.

**868.** There are two exceptions to the rule laid down by section 26:

Exceptions to rule of section 26.

(1) Where the date of the will as opposed to the death is distinctly referred to.

*Cole v. Scott*, 1 Mac. & G. 518.

(2) Where there is a sufficient particularity in the description of the specific subject of gift showing that an object in existence at the date of the will was intended.

See *Webb v. Byng*, 1 K. & J. 580.

27. Unless a contrary intention appears by the will, such real estate or interest therein as is comprised or intended to be comprised in any devise, in such will contained, which fails or becomes void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will. R. S. O. 1887, c. 109, s. 27.

**869.** A gift of the residuary personal estate of the testator comprises every interest in the personal estate which the will in effect does not otherwise dispose of; thus, (1) A general residuary bequest carries lapsed and void legacies.

Lapsed devise to sink into residuary devise, Imp. Act, 1 V. c. 26, s. 25.

*Leake v. Robinson*, 2 Mer. 393.

**870.** A testator may show an intention to confine a residuary bequest, so as to exclude from it in effect property specifically given.

See *Wainman v. Field*, Kay 507.

**871.** The most important exception to the comprehensiveness of a general residuary bequest is that it does not include any part of the residue itself which fails. Residue means all of which no effectual disposition is made

Effect of gift of residue personal estate.

by will other than the residuary clause; but when the disposition of the residue itself fails to the extent to which it fails the will is inoperative.

*Skrymsher v. Northeate*, 1 Sim. 570.

**872.** A general residuary bequest contingent in terms carries the intermediate income which is not undisposed of but accumulates.

*Trevarian v. Vivian*, 2 Ves. Sen. 430.

Residuary  
devises be-  
fore 1st  
Jan., 1874.

**873.** As to residuary devises in wills made before the 1st of January, 1874, a residuary devise of real estate does not include specific devises which lapse. In wills made or republished after the 1st of January, 1874, real estate comprised in a devise which fails or is void passes under the residuary devise in a will unless an intention appear to the contrary.

Interme-  
diate rents  
and pro-  
fits.

**874.** Devises of real estate to take effect at a future period do not in general carry the intermediate rents and profits until the period of vesting.

*Genery v. Fitzgerald*, Jac. 468.

**875.** But where the real and personal estate are given together, such a gift, although contingent in terms, carries the intermediate rents and profits of the real estate, as well as the income of the personal estate.

Realestate  
contracted  
to be sold.

**876.** Where the real estate is directed by will to be sold, a general or residuary bequest of the testator's personal property does not prima facie include the proceeds of such real estate directed to be sold.

*Maugham v. Mason*, 1 V. & B. 410.

Lease-  
holds when  
testator in  
any place  
or in the  
occupation  
of any person  
mentioned  
in his will,  
or otherwise  
described in  
a general  
manner, and  
any other  
general  
devise which  
would describe  
a leasehold  
estate, if the  
testator had  
no freehold  
estate which  
could be  
described by  
it, shall be  
construed to  
include his  
leasehold  
estates, or  
any of them  
to which  
such  
description  
will extend  
(as the case  
may be) as  
well as  
freehold  
estates, unless  
a contrary  
intention  
appears by  
the will. R. S. O.  
1887, c. 109, s. 28.

(28) A devise of land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include his leasehold estates, or any of them to which such description will extend (as the case may be) as well as freehold estates, unless a contrary intention appears by the will. R. S. O. 1887, c. 109, s. 28.

**877.** In wills made before the 1st of January, 1874, "a devise of lands," or "lands and tenements," does not prima facie include leaseholds for years unless at the time of the devise the testator had no freehold lands answering to the description. In wills made or republished on or after the 1st of January, 1874, every general devise of lands, etc., prima facie includes leaseholds for years as well as freeholds.

29. A general devise of the real estate of the testator or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate or any real estate to which such description will extend (as the case may be) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention appears by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal estate described in a general manner shall be construed to include any personal estate, or any personal estate to which such description will extend (as the case may be), which he may have power to appoint in any manner he may think proper and shall operate as an execution of such power, unless a contrary intention appears by the will. R. S. O. 1887, c. 109, s. 29.

A general devise of realty or personalty to include property over which testator has a general power of appointment, Imp. Act, 1 V. c. 26 s. 27.

**878.** If a will does not purport to be in execution of the particular power or of all powers vested in the testator, devises and bequests contained in the will prima facie do not include property not the testator's own, but over which he has a power of disposition.

*Webb v. Horner*, 1 J. & W. 352.

**879.** But if the property subject to the power be sufficiently described so that it is clear that the testator had in view the subject of the power a devise or bequest will operate as an execution of the power.

*Lovnds v. Lovnds*, 1 Y. & J. 445.

**880.** A bequest of a sum of stock of the same description as that subject to the power is not a description of the property subject to the power so as to show an intention to execute the power, but is a mere general legacy.

Bequest of sum of stock.

*Nannock v. Horston*, 7 Ves. 391.

K.E.A. 19

**881.** A gift by will of legacies identical with the amount of the fund does not in general show an intention to execute the power.

*Davis v. Thomas*, 3 De G. & Sm. 317.

**882.** As regards real estate: if a testator devise "all his lands" or "all his lands in A.," or "all his real estate," and has at the time of the devise no lands of his own answering to the description, lands over which he had a power will pass by the devise.

Distinction between general and special powers.

**883.** The 29th section introduces a distinction between general powers of appointment and special powers. The latter are unaffected by the Statute, but with regard to general powers general devises of real estate are deemed to extend to general powers.

**884.** In wills made or republished on or after the 1st of January, 1874, a general residuary bequest will include not only property ineffectually attempted to be bequeathed, but also property over which the testator had a general power of appointment, and which he by his will ineffectually appointed; thus, if a testator in exercise of a general power of appointment gives £5,000 to A., and gives the residue of his personal estate to B., and A. dies in the testator's life time, the £5,000 appointed to A. will pass under the residuary gift to B.

*Bernard v. Minshull*, 1 Johns., 276.

General devise to pass whole estate in the land devised. Imp. Act, 1 V. c. 26, s. 23.

30. Where any real estate is devised to any person without any words of limitation, such devise shall, subject to The Devolution of Estates Act, be construed to pass the fee simple, or other the whole estate or interest, which the testator had power to dispose of by will, unless a contrary intention appears by the will. R. S. O. 1887, c. 109, s. 30.

**885.** In wills made before the 1st of January, 1874, a devise of lands to A. *simpliciter* confers an estate for life unless an intention appear to the contrary.

*Hogan v. Jackson*, Cowp. 306.

**886.** As the word "estate" may either mean the "Estate" land itself or the testator's interest in it, in order to limit the operation of the preceding rule it is held that the word "estate" is sufficient to pass the fee simple of land although accompanied by words of locality or occupation.

**887.** But the word "estate" must be an operative word occurring in the gift itself. If the testator devise lands to A. *simpliciter* and afterwards refers to the same lands as "the said estate" this does not carry the fee to A.

*Burton v. White*, 1 Exch. 535.

**888.** A devise of "all my effects real and personal" passes a fee simple of lands.

*Lord Torrington v. Borman*, 22 L. J. Ch. 236.

**889.** In wills made before the 1st of January, 1874, a devise of lands to A. he paying £10 to B. passes the fee simple; but a devise to A. subject to a charge of £10, passes only an estate for life. The rule in such a case is that an indefinite devise is enlarged to a fee simple by a charge however small on the person of the devisee or on the quantum of interest devised to him, but not if the devise is merely subject to a charge.

*Burton v. Powers*, 3 K. & J. 170.

**890.** In wills made before the 1st of January, 1874, if lands are devised to A. indefinitely with a gift over in event of A. dying under twenty-one; A., if he attains that age, takes a fee simple.

*Frogmorton v. Holyday*, 3 Barr. 1618.

**891.** Section 30 above set out alters the above rules in the case of wills made or republished on or after the 1st day of January, 1874, and in such wills a devise of lands without words of limitation passes the fee simple unless an intention appears to the contrary.

**892.** This section applies only to devises of previously existing estates or interests, and not to the devise of an estate created by the will.

*Nicholls v. Hawkes*, 10 Hare, 342.

**893.** A devise of rents and profits to A. without words of limitation in a will prior to the 1st of January, 1874, passes only an estate for life, but in a will made or republished on or after the 1st of January, 1874, a devise of the rents and profits of the land will by force of the 30th section pass the fee simple of the land.

See *Crawford v. Lundy*, 23 Ch. 244.

Meaning of "heir" in a devise of real estate. 31. Where any real estate is devised by any testator, dying on or after the 5th day of March, 1880, to the heir or heirs of such testator, or of any other person, and no contrary or other intention is signified by the will, the words "heir" and "heirs" shall be construed to mean the person or persons to whom such real estate would descend under the law of Ontario in case of an intestacy. R. S. O. 1887, c. 109, s. 31.

Import of words "die without issue," or "die without leaving issue," or "have no issue," or to that effect. 32. In any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention appears by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise; but this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift be born, or if there be no issue who live to attain the age, or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue. R. S. O. 1887, c. 109, s. 32.

Effect of thirty-second section.

**894.** Effect of 32nd section.—If (in a will since 1st January, 1874,) real estate be devised to A. and his heirs, or to A. indefinitely, with a limitation over to take effect on the death of A. without issue, or without having or leaving issue, A. will not (as before) take an estate tail

with remainder over, but an estate in fee, with an executory devise over in the event of his death without issue living at his death.

**895.** So, if the devise be to A. for life, with a limitation over on his death without issue, A. will not, as before, take an estate tail, but an estate for life only, with the like executory devise over.

**896.** Again, if personal estate be given to A., with a bequest over to B. upon the death of A. without issue, the gift over will not (as before) be void for remoteness, but will take effect as a contingent executory bequest upon the death of A. without issue living at his death.

**897.** In order to understand section 32, it is necessary to premise that section 31 only applies to a case where the word "heir" or "heirs" is used, and no contrary or other intention is signified by the will. Cases where such other intention is signified must therefore be considered. Scope of section 31.

**898.** Under a devise to "heirs male of the body" the heir male of the body taking by purchase need not be heirs general. Thus, if a devise be to the "heirs male of the body" of A. who has died leaving a younger son and daughter of a deceased eldest son, the younger son will take an estate in tail male by virtue of the devise, although the granddaughter is heir. Devise to "heirs male of body."

*Angell v. Angell*, 9 Q. B. 328.

**899.** "Heirs male of the body" or "issue male" mean descendants in the male line only, that is males claiming through males.

*Bernal v. Bernal*, 3 My. & Cr. 559.

**900.** In a deed a limitation to A. and his heirs male confers an estate in fee, the word "male" being rejected as repugnant; but with respect to devises, the rule is that heirs male in a will mean "heirs male of the body." A. and his heirs.

*Lindsay v. Colyear*, 11 East, 548.



A. for life  
with re-  
mainder  
to "heir."

**901.** A devise to A. for life with remainder to the "heir" or "heir male of the body" without words of inheritance super-added creates an estate tail in A.; but where words of limitation are added to a devise to the heirs male, A. takes an estate for life only, and the heir male of his body takes an estate in tail male as purchaser.

*White v. Collins*, 1 Com. Rep. 389; *Archer's Case*, 1 Rep. 66.

Rules of  
construction  
of  
word heir.

**902.** With the intention of restraining the meaning of "heirs" to "heirs of his body," certain rules of construction have been adopted. (1)—A devise of real estate to A. and his heirs confers only an estate tail, heirs being construed heirs of his body.

*Good v. Good*, 7 E. & B. 295.

(2) A devise of real estate to A. and his heirs followed by a limitation over to take effect on a general failure at any time of issue or heirs of the body of A. vests in A. only an estate tail, the word "heirs" being construed to mean "heirs of the body."

*Ellis v. Ellis*, 9 East, 382.

Now in wills made or republished on or after the 1st of January, 1874, the expressions "die without issue," etc., are prima facie restricted to failure of issue at the death of the person, and therefore cannot have the effect of restraining heirs to mean heirs of the body.

If the expressions "on failure of issue" or "in default of issue," are not within the 32nd section, then in a case of a devise to A. and his heirs with a gift over on failure of issue of A., A. will take an estate tail.

Devise to  
B. heir-at-  
law.

(3) If real estate is devised to B. on failure of heirs of A., and B. is capable of being heir to A., the word "heirs" is construed to mean "heirs of the body." But if B. be not capable of inheriting land from A., the meaning of the word "heirs" will not be restricted.

*Harris v. Davis*, 1 Coll. 423; *Tillburgh v. Barbut*, 1 Ves. Sen. 89.

**903.** A gift of real estate to the heir after the death of a particular person is considered necessarily to imply not so much an intention to benefit that person as an intention to exclude the heir during his life, which can only be effected by leaving a life estate to the person in question. Therefore, if real estate be devised after the death of A. to B., the heir-at-law of the testator, and the will contains no disposition of the property during the life of A., A. takes an estate for life by implication; but if B. is not the heir-at-law A. takes no estate.

*Ree v. Inhabitants of Ringstead*, 9 B. & C. 248.

**904.** If personal estate is given to A. "or" his heirs the word "heirs" is read as a word not of limitation, but of substitution so as to prevent a lapse; but in a case of real estate, a devise to A. "or" his heirs gives to A. an estate in fee, the word "or" being read "and."

*Read v. Snell*, 2 Atk. 645.

**905.** In devises of real estate the words "heirs of the body" following a gift to the ancestor, are words of limitation, and create an estate tail notwithstanding the addition of other inconsistent words or expressions.

*Jordan v. Adams*, 9 C. B. N. S. 483.

**906.** Words of limitation, whether general or super-added to a gift to the heirs of the body, do not exclude the operation of the rule. Thus a devise to A. for life with remainder to the heirs of his body, share and share alike their heirs and assigns (or heirs male) would vest in A. an estate tail, the inconsistent words being rejected as repugnant.

*Mills v. Seward*, 1 J. & H. 733.

**907.** In directions to settle lands by way of executory trusts, the rule is not so inflexibly applied.

*Papillon v. Voice*, 2 P. Wms. 471.

**908.** A bequest of personal estate or chattels real to A. or the heirs of his body, or to A. for life and after his decease to the heirs of his body, vests the property in A. absolutely.

*Williams v. Lewis*, 6 H. L. C. 1013.

Personal estate to A. or his heirs.

Words of limitation do not exclude rule.

Bequest of personal estate to A. or the heirs of his body.

**909.** It has sometimes been laid down that whatever words in a devise of real estate would create an estate tail, confer the absolute interest in personal estate.

"Issue" equivalent to heirs of the body.

**910.** As regards the words "heirs of the body," the statement is correct, but with regard to the word "issue" there is a difference. The word "issue" in devises of real estate is prima facie a word of limitation, and is equivalent to "heirs of the body." Thus a devise to A. and his issue, or to A. for life and after his decease to his issue, vests in A. an estate tail.

*Roddy v. Fitzgerald*, 6 H. L. C. 825.

**911.** While words of distribution are insufficient to alter the meaning of "heirs of the body," on the other hand words of distribution and limitation annexed to a devise to issue suffice to show that the issue should take by purchase.

*Lea v. Mosley*, 1 Y. & C. 589.

Executory trust.

**912.** The rule which construes "issue" as a word of limitation in devises, does not apply so strictly to a direction to sell lands by way of executory trusts. Thus if lands be directed to be settled on A. for life with remainder to his issue, A. will be held to take for life only.

*Meure v. Meure*, 2 Atk. 265.

"Issue" as applied to bequests of personal estate.

**913.** The rule that "issue" is prima facie a word of limitation does not extend to bequests of personal estate. If it be clear that the testator intended to make such a disposition of personal estate as if made in a case of real estate would amount to an estate tail, the first taker will take the absolute interest; but it is not the case that every expression which would create an estate tail in real estate will be held to indicate the same intention in the case of personal estate. Thus if personal estate or chattels be given to A. for life, and after his decease to his issue, A. takes for life only and the issue take in

remainder; although there be a gift over on failure of issue of A.

*Ex parte Wynch*, 5 D. M. G. 188.

**914.** A devise of real estate to A. and his children, A. <sup>Devise to A. and his children.</sup> having no children at the time of the devise vests in A. an estate tail, children being considered as a word of limitation.

*Wild's Case*, 6 Rep. 17.

**915.** A bequest of personal estate to A. and his <sup>Bequest to A. and his children.</sup> children is prima facie a gift to the parent and the children concurrently. Thus if a gift be immediate, A. and his children (if any) living at the death of the testator, will take as joint tenants, and if no children at that period A. will take the whole. If the gift be deferred, A. will take jointly with the children living at the testator's death and subsequently born before the period of distribution, and if no children A. will take the whole. Again, if A. predeceased the testator, the gift would not lapse, but his children would be entitled.

*Mason v. Clarke*, 17 B. 130; *Cunningham v. Murray*, 1 DeG. & S. 366; *Read v. Willis*, 1 Coll. 86.

**916.** A devise of real estate to A. for life, or to A. <sup>Devise to A. for life with gift over.</sup> indefinitely followed by a gift over on general failure of issue vests in A. an estate tail.

*Machell v. Wedding*, 8 Sim. 4.

**917.** But since the 1st of January, 1874, a devise to a person indefinitely with a gift over on his death without issue, will confer an estate in fee simple with an executory devise over on death without issue living at the death, and a devise for life with a like gift, confers only an estate for life. <sup>Devise to several.</sup>

**918.** A bequest of personal estate to A. with a gift <sup>Bequest to several.</sup> over on a general failure of his issue, vests the property in A. absolutely.

**919.** If real estate be devised to several or to a class as tenants in common with a limitation over on failure of issue of all the devisees, cross-remainder in tail are prima facie to be implied amongst them.

*Atkinson v. Barton*, 3 DeG. F. & J. 339; *Ray v. Gould*, 15 U. C. R. 131.

**920.** If personal estate be given to several or to a class as tenants in common for life with a gift over on the death of the survivor, cross limitations for life must be implied amongst them.

*Pearce v. Edmeades*, 3 Y & C. 246.

Devise to  
A. with  
limitation  
over on  
death un-  
der 21.

**921.** If real estate be devised to A. in fee simple with a limitation over in the event of A. dying under twenty-one, or without issue, the word "or" will be read "and," and the gift over will be construed to take effect only in the event of A. dying under twenty-one and without issue.

*Right v. Day*, 16 East, 69.

Meaning  
of sec. 32.

**922.** Having thus examined the manner of creating an estate tail, whether by the correct use of technical terms or by implication, we come now to consider the meaning of section 32.

Die with-  
out issue  
in wills  
before 1st  
Jan., 1874.

**923.** Where there is a devise of an estate tail followed by a limitation over in the event of the devisee dying without issue, the rule for wills made before the 1st of January, 1874, is laid down that the words "die without issue" are construed to mean the death of the person spoken of, and failure of his issue at the time of his death or at any time afterwards, unless the context shows the meaning to be confined to a failure of issue at the time of his death.

*Candy v. Campbell*, 2 Cl. & F. 421.

**924.** The rule applies to real and personal estate; thus, if real estate be devised to A. and his heirs, or to A. for life, or to A. indefinitely with a limitation over, in the

event of A. dying without issue, A. takes an estate tail with remainder over (heirs being considered heirs of the body).

**925.** So if personal estate be given to A. with a limitation over in the event of A. dying without issue, A. takes an absolute interest, the gift over being void for remoteness. But the rule does not apply where a gift over is on the death under a given age without issue. Thus a devise to A. or to A. and his heirs with a gift over if A. dies under twenty-one without issue, vests in A. an estate in fee with an executory devise over in the event of the failure of issue at his death and not an estate tail.

*Toovey v. Bassett*, 10 East, 460.

**926.** In wills prior to 1874, the words "die without issue" may be restrained to mean a failure of issue at the death of a person and not an indefinite failure of his issue. This construction is exemplified in the following cases:

Die without leaving issue equivalent to "die without issue."

(1) Where the gift over is expressly to take effect on the death of a person. Thus if real estate is devised to A. and his heirs, and if A. dies without issue, to B. upon the death of A., the latter words restrain the gift over to a failure of issue at the death, and A. takes an estate in fee with an executory devise over and not an estate tail.

*King v. Frost*, 3 B. & Ald. 546.

If personal estate be given to A. with a gift over if A. die without issue, upon the death of A. the gift over will take effect as an executory bequest on failure of issue at the death.

*Pinbury v. Elkin*, 1 P. W. 563.

(2) Where there is a bequest of personal estate to several as tenants in common, with a gift over of the share of any one dying without issue to the survivors or survivor, the presumption is raised that an indefinite failure of issue was not contemplated, and the words

"die without issue" will be restricted to a failure of issue at the death of the person whose share is spoken of.

*Ranclagh v. Ranclagh*, 2 My. & K. 441.

But under a devise to several and their heirs as tenants in common, with a gift over on the death of any without issue to the survivors, the devisees will take estates tail.

(3) Where there is a devise to A. and his heirs with a gift over if A. should die under twenty-one, or having attained twenty-one, should die without issue, the words "die without issue" are restrained to the failure of issue at the death.

*Glover v. Monckton*, 3 Bing. 13.

**927.** But the cases in which "die without issue" are restricted to failure of issue at the death of a person whose issue is spoken of, must be distinguished from those in which, although not so restricted, it is still confined to a failure of issue in the lifetime of certain other persons. Thus if real estate be devised to A. and his heirs, with a gift over upon the death of A. without issue in the life time of B., and B. be living at the testator's death, A. takes an estate in fee with an executory devise over on failure of his issue within the given period, and not an estate tail.

*Pells v. Brown*, Cro. Jac. 590

**928.** In wills made before the 1st of January, 1874, in relation to real estate, the words "die without leaving issue" are equivalent to "die without issue," and import a failure of issue at the death of the person whose issue are spoken of, or at any time afterwards, unless an intention appear to the contrary. But, with relation to personal estate and chattels real, the words "die without leaving issue" import a failure of issue at the death of the person spoken of and not an indefinite failure of his issue.

*Forth v. Chapman*, 1 P. W. 663.

**929.** Under section 32 in wills made or republished after the 1st of January, 1874, in devises and bequests of real or personal estate, the expressions "die without issue," "die without having issue," "die without leaving issue," are construed to mean a failure of issue at the death of the person whose issue is spoken of, and not an indefinite failure of issue unless an intention appear to the contrary.

Construction of wills after 1st Jan., 1874.

33. Where any real estate is devised to a trustee or executor, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years absolute or determinable, or an estate of freehold is thereby given to him expressly or by implication. R. S. O. 1887, c. 109, s. 33.

When devise to trustee or executor shall pass whole estate of testator. Imp. Act, 1 V. c. 26, s. 30.

**930.** Two questions may arise respecting the nature and quality of the estate taken by trustees under a devise to them:—

- (1) What is the quantum of estate and interest, beneficial as well as legal, vested in the trustees for the active purposes (if any) of the trusts reposed in them?
- (2) What becomes of the legal estate (if any) remaining after the active purposes of trusts are satisfied; does it remain in the trustees, or pass from them to the cestuis que trust?

What estate may be taken by trustee under devise to them.

**931.** As to the quantum of estate taken by the trustees for the active purposes of the trust, a devise of real estate to a trustee in trust to pay the rents and profits to A. vests the legal estate in the trustee, but a devise to a trustee in trust to permit A. to receive the rents and profits vests the legal estate in A.

*Barker v. Greenwood*, 4 M. & W. 429.

**932** In devises to trustees, it is not necessary that the word "heirs" should be inserted to carry the fee at law; for if the purposes of the trust cannot be satisfied without having a fee, courts of law will so construe it. Thus, if in a will prior to the 1st of January, 1874, lands be devised unto and to the use of trustees and their heirs

Word heir need not be inserted to carry fee.



in trust for A. indefinitely, the estate of A. is not extended to a fee simple, because the estate taken by the trustee is co-extensive only with the trust to be performed, and it is therefore limited to an estate during the life of A., but a devise unto and to the use of A. in trust for B. and his heirs gives A. the whole legal fee simple.

*Challenger v. Sheppard*, 8 T. R. 597.

Devise to trustee in trust to pay debts.

**933.** Again, if the devise be to the trustee in trust to pay the testator's debts and subject thereto in trust for A., A. takes an equitable fee simple.

Will after 1st Jan., 1874.

**934.** In wills made or republished on or after the 1st of January, 1874, in no case are trustees to take an indefinite term of years for the purposes of the trust, and any devise under which before the passing of the Act a trustee would have been held to take an indefinite or uncertain term of years, shall now be construed to pass the fee

When devise to a trustee shall pass the whole estate beyond what is required for the trust.  
Imp. Act, 1 V. c. 26, s. 31.

34. Where any real estate is devised to a trustee without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, is not given to any person for life, or such beneficial interest is given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall, subject to The Devolution of Estates Act, be construed to vest in such trustee the fee simple or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust are satisfied. R. S. O. 1887, c. 109, s. 34.

Wills before 1st Jan., 1874, what estate taken by trustees

**935.** As regards the disposition of such legal estate as is not required to be vested in the trustees for the active purposes of the trust: the rule is that in wills made before the 1st January, 1874, where real estate is devised to trustees, although with words of inheritance, *prima facie* the trustees take only as much of the legal estate as the purposes of the trust require.

*Blagrove v. Blagrove*, 4 Exch. 550.

**936.** The rule applies to limitations to trustees in trust to preserve contingent remainders. Thus if lands be devised to A. for life with remainder to trustees and their heirs in trust to preserve contingent remainder with remainder to the first and other sons of A. in tail and there are no other contingent remainders subsequently limited, the estate of the trustees, though not entirely limited to the life of A., will be restricted to that period by implication, since the purpose of the trust cannot continue longer and the remainder over will be legal and not equitable.

Trusts to preserve contingent remainders.

**937.** The rule that the estate taken by trustees is restricted to the quantity necessary for the performance of trusts was carried out by the adoption of the construction of an indefinite term of years and a determinable fee.

Construction of indefinite term of years.

**938.** Where the estate was limited to trustees simpliciter or to trustees and their executors or administrators upon trust out of the annual rents and profits only to raise a given sum of money to pay debts, legacies, etc., with a direct devise over of the beneficial interest; it was held that the trustees took the legal estate only for an uncertain term of years sufficient to raise the entire sum and the estates of the devisees in remainder were legal estates.

Construction of determinable fee.

*Ackland v. Lutley*, 9 A. & E. 879.

**939.** Where the devise was to trustees and their heirs in trust to pay debts or to raise a sum of money with limitations over, it was considered that the trustees might take the fee simple only until the money required had been raised, and when it should have been raised without a sale, the legal fee in the trustees should determine and the devisees over take legal estates. A devise to trustees in trust to pay the testator's debts vests in them the absolute legal fee. But a charge of debts on the lands devised, the trustees not being directed to pay the debts, does not enlarge the estate of the trustees.

*Kewrick v. Lord Beaucherk*, 3 B. & P. 178.

Devise to  
pay an-  
nuity.

**940.** In wills made before the 1st of January, 1874, a devise to trustees and their heirs in trust to pay an annuity out of the annual rents and profits only and subject thereto in trust for A. in fee, the annuity not being a charge on the corpus of the lands, vests the legal estate in the trustees for life only during the life of the annuitant.

*Adams v. Adams*, 6 Q. B. 860.

Annuity a  
charge on  
the corpus.

**941.** But if the annuity be a charge on the corpus of the land, as if lands be devised to trustees in trust to pay thereout an annuity to A., and subject thereto in trust for B., the trustees take the fee simple.

*Fenwick v. Potts*, 8 D. M. G. 506.

Devise fol-  
lowed by  
powers.

**942.** Where a devise to trustees upon trusts which standing alone would not vest in them the whole legal estate is followed by a power to sell, lease or mortgage not limited to the period of continuance of the active trusts, the trustees are held to take the whole legal fee and not a mere limited estate with a super-added power to sell or lease.

*Watson v. Pearson*, 2 Exch. 581.

**943.** Similarly a devise to trustees followed by a general power of leasing vests in them a fee simple.

*Riley v. Garnett*, 3 De G. & Sm. 629.

Devise to  
pay rents  
and on  
death to  
convey.

**944.** If a devise be to trustees in trust to pay the rents and profits to A. for life, and after his death to convey the estate to B., the trustees take a fee simple.

*Shelley v. Edlin*, 4 Ad. & E. 582.

Meaning  
of sections  
33 and 34.

**945.** The rule that the legal estate vested in trustees is limited to the amount necessary for the performance of the active trust reposed in them is now laid down by the 34th section. With regard to sections 33 and 34 their meaning and effect are thus stated by Mr. Hawkins:

The 33rd and 34th sections of the Wills Act have been described as obscure and even conflicting; their meaning, however, will be apprehended by observing, that the 33rd section, which speaks of a

devise passing "the fee simple or other the whole estate or interest of the testator," relates to the quantity of estate to be taken by a trustee for the purposes of the trust; while the 34th section, which declares that a devise shall vest in trustees "the fee simple or other the whole legal estate" in the premises devised, relates to the disposition of the legal estate not required for the purposes of the trust. The 33rd section enacts that in no case shall trustees or executors be held, for the purposes of the trust, to take an indefinite term of years; the 34th section enacts that where the estate of the trustees is not expressly limited they shall in all cases take either an estate determinable on the life of a person taking a beneficial life interest in the property, or the absolute legal estate in fee simple.

Effect of the 34th section.—The 34th section seems to have been chiefly aimed at the doctrine, now (as before observed) abandoned, of a determinable fee. Its operation in other respects will be as follows:

1st. The ordinary case of a devise to trustees in trust to pay the rents and profits to A. for life, and after his decease in trust for B. and his heirs, is left unaltered; the legal estate will still vest in B. after the death of A.

So, in the case of a devise to A. for life, with the remainder to trustees and their heirs in trust to preserve contingent remainders, with remainder to the first and other sons of A. in tail, with vested remainders over; the estate of the trustees to preserve will still be restricted by implication to the life of A.

2dly. Trusts to pay annuities will be altered. A devise to trustees in trust to pay an annuity to A. for life, and subject thereto in trust for B., will now vest in the trustees the whole legal fee simple, and not an estate during the life of the annuitant, although the annuity be payable out of the annual rents and profits only.

3dly. Trusts during minority will present a difference. If the devise be to trustees in trust to apply the rents and profits for the maintenance of A. during his minority, and when A. attains twenty-one in trust for A. during his life, with remainders over, the legal estate will still as before vest in A. on his attaining twenty-one, inasmuch as the beneficial interest is given to him for life, and the purposes of the trust cannot continue longer.

But if the devise be (after the trust during minority) in trust for A. on his attaining twenty-one, in fee or in tail, and not for life only, the section will apply, and the whole legal estate will remain in the trustees, so that the estate of A. will be equitable only.

It may be a question whether, if the trusts declared are to pay the rents and profits to several persons (not to one only) successively

for life, with remainders over, the legal estate will vest in the trustees in fee simple or for the lives of the respective persons taking beneficial life interests.

The section appears to apply to every case where there is no express limitation of the estate to be taken by the trustee, although the gifts over to the persons beneficially entitled may be in the form of a direct devise to them. Thus, if the gift be, "I devise Whiteacre to A. and his heirs in trust to apply the rents and profits during the minority of B. for his benefit, and when B. attains twenty-one I devise Whiteacre to B.—" it would appear that the trustees must, notwithstanding the latter words, take the fee by force of the 34th section.

The last two sections of the construction clauses of the Wills Act are as follows :

When devise of estates tail shall not lapse Imp. Act. 1 V. c. 26 s. 32.

35. Where any person to whom any real estate is devised for an estate tail or an estate in quasi entail, dies in the lifetime of the testator, leaving issue, who would be inheritable under such entail, and any such issue are living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will. R. S. O. 1887, c. 109, s. 35.

Gifts to issue who leave issue on testator's death shall not lapse Imp. Act 1 V. c. 26 s. 33.

36. Where any person being a child or other issue of the testator, to whom any real or personal estate is devised or bequeathed for any estate or interest not determinable at or before the death of such person, dies in the lifetime of the testator, leaving issue, and any of the issue of such person are living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will. R. S. O. 1887, c. 109, s. 36.

## CHAPTER VI.

## PAYMENT OF THE RESIDUE.

**946.** Where the executor has paid all the success- Payment of residue.  
 sion duties the debts, the funeral and testamentary ex-  
 pences, and all the legacies heretofore mentioned, he  
 must in the last place pay over the surplus or residue of  
 the estate to the residuary legatee, or devisee, if any such  
 be nominated.

**947.** If the residuary legatee dies before the pay- Death of residuary legatee.  
 ment of debts, and before the amount of the surplus is  
 ascertained, yet it shall devolve to his personal repre-  
 sentative.

Wms. p. 1316.

**948.** The residuary legatee has a right to insist Rights of residuary legatee.  
 that the executor, before the end of the first year after  
 the testator's death, shall, if possible, convert all the  
 assets into money, and pay the funeral, testamentary ex-  
 penses, debts and legacies, and hand over the clear  
 residue to the residuary legatee.

*Wightwick v. Lord*, 6 H. L. 217, 235.

**949.** As to residuary devisees. By section 27 of the Residuary devise.  
 Wills Act, unless a contrary intention appears by the  
 will, such real estate or interest therein as is com-  
 prised or intended to be comprised in any devise, which  
 lapses or becomes void by reason of the death of the de-  
 visee in the lifetime of the testator, or by reason of such  
 devise being contrary to law, or otherwise incapable of  
 taking effect, shall be included in the residuary devise  
 if any contained in the will.

R. S. O. 1897, c. 128, s. 27 (s. 27 R. S. O. 1887, c. 109).

Mode of constituting residuary legatee.

**950.** No particular mode of expression is necessary to constitute a residuary legatee. It is sufficient if the intention of the testator be plainly expressed in the will, that the surplus of his estate, after payment of debts and legacies, be taken by a person there designated.

*Fleming v. Burrows*, 1 Russ. 276.

To what residuary legatee entitled.

**951.** Where the residuary legatee is nominated, generally he is entitled in that character to whatever may fall into the residue after the making of the will by lapse, invalid disposition, or other accident, or by acquirement subsequent to the date of the will.

*Rose v. Rose*, 17 Ves. 347.

Failure of particular intent, effect of.

**952.** The foundation of the general rule in respect to lapsed legacies is that the residuary clause is understood to be intended to embrace everything not otherwise effectually given, because the testator is supposed to take the particular legacy away from the residuary legatee only for the sake of the particular legatee. So that upon the failure of the particular intent the Court gives effect to the general intent.

*Easum v. Appleford*, 5 M. & Cr. 61, 62.

Residuary bequest to several as tenants in common.

**953.** When, therefore, from the construction of the will the presumption in favor of such general intent is negatived, the rule does not apply, and the lapsed legacy is undisposed of. Such is the case of a residuary bequest to several as tenants in common. The share of one dying in the testator's lifetime does not pass.

*Bryan v. Twigg*, L. R. 3 Eq. 433.

**954.** The testator may by the terms of the bequest narrow the title of the residuary legatee so as to exclude him from lapsed legacies, as where it appears to be the intention of the testator that the residuary legatee should have only what remained after the payment of legacies.

*Bland v. Lamb*, 2 Jac. & Walk. 406.

**955.** Again, the testator may so circumscribe and confine the residue, as that the residuary legatee instead of being a general legatee shall be a specific legatee, and then he shall not be entitled to any benefit accruing from lapse unless what shall have lapsed constitute a part of the particular residue.

*De Trufford v. Tempest*, 21 Beav. 564.

**956.** Where the residuary estate is bequeathed to several persons in joint tenancy, if one or more of them happen to die in the lifetime of the testator, or after his death, but before the severance of the joint tenancy in the residue, their shares will survive to the others; but if the residue be given to several as tenants in common, the shares of the deceased shall not go to the survivors, but shall devolve on the testators next of kin according to the Statute of Distributions as so much of the personal estate remaining undisposed of by the will, in case the death happen in the lifetime of the testator, or shall go to the personal representatives of the deceased legatee in case his death took place after that of the testator.

*Peat v. Chapman*, 1 Ves. Sen. 542.

**957.** But where a money legacy or residue is given to more persons than one by any mode of expression which denotes a severance, the legatees will be tenants in common, as where the gift is to A. and B. "share and share alike," or "equally to be divided between them," or "respectively," or "between them."

*Ryces v. Ryces*, L. R. 11 Eq. 539.

**958.** Where co-executors take a residue in that character, they take as joint-tenants; therefore, if one of them dies after the death of the testator, but before the severance of the joint tenancy in the residue, his share will survive to his co-executors, and his own executors or administrators will be excluded as well as the next of kin of the testator.

*Knight v. Gould*, 2 M. & K. 299-303.



When residue goes to next of kin.

**959.** If the testator neither makes any disposition of the residue, nor appoints an executor, the residue belongs clearly to the next of kin; but, if the testator appointing an executor makes no disposition of the residue, the question arises whether it belongs to such executor or to the next of kin.

Right of executor to residue.

**960.** At law it has been the rule from the earliest period that the whole personal estate devolves on the executor, and if, after payment of the funeral expenses, testamentary charges, debts and legacies, there shall be any surplus it shall vest in him beneficially.

*Urquhart v. King*, 7 Ves. 225.

**961.** In equity the rule has been the same as at law, the executor by the mere force of the appointment takes all the undisposed of residue of the personal estate as well beneficial as legal.

**962.** But where a necessary implication or strong presumption has appeared, that the testator meant to give only the office of executor, and not the beneficial interest in the residue, in all such cases the executor has been considered a trustee for the next of kin of the testator, or in cases where no next of kin can be found, a trustee for the Crown.

## CHAPTER VII.

## DUTIES AND POWERS WITH RESPECT TO CHILDREN OF DECEASED.

**963.** An executor often finds one of the most delicate parts of his duty to be that towards the children of the deceased. <sup>Children of deceased.</sup> If the mother survive she may not be appointed guardian under the will and may resent the exclusion. Or, she may be appointed guardian and may marry again. In either case the executor will find his position unsatisfactory.

**964.** The following provisions of the Act respecting Infants, R. S. O. 1867, c. 168, deals with these points : \*

## CUSTODY OF INFANTS.

1. (1) The High Court or Surrogate Court, or any Judge of either Court may, upon the application of the mother of an infant (who may so apply without next friend) make such order as the Court or Judge sees fit regarding the custody of the infant, and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may afterwards alter, vary or discharge the order on the application of either parent, or, after the death of either parent, of any guardian under the Act, and in every case may make such order respecting the costs of the mother and the liability of the father for the same, or otherwise as to costs as the Court or Judge may think just.

(2) The Court or Judge may also make order for the maintenance of the infant by payment by the father thereof, or by payment out of any estate to which the infant is entitled, of such sum or sums of money from time to time as according to the pecuniary circumstances of the father, or the value of the estate, the Court or Judge thinks just and reasonable. R. S. O. 1887, c. 137, s. 1.

2. No order directing that the mother shall have the custody of or access to an infant shall be made by virtue of this Act, in favour of a mother against whom adultery has been established by judgment in an action for criminal conversation at the suit of her husband against any person. R. S. O. 1887, c. 137, s. 2.

\*In questions relating to the custody and education of infants, the Rules of Equity shall prevail. Jud. Act R. S. O. 1897, c. 51, s. 58 (12).

## INFANTS REAL ESTATE.

The sale of the estate of infants may be authorized.

3. (1) Where an infant is seised or possessed of or entitled to any real estate in fee or for a term of years, or otherwise howsoever, in Ontario, and the High Court is of opinion that a sale, lease or other disposition of the same, or of a part thereof, is necessary or proper for the maintenance or education of the infant, or that, by reason of any part of the property being exposed to waste and dilapidation, or to depreciation from any other cause, his interest, requires or will be substantially promoted by such disposition, the Court may order the sale, or the letting for a term of years, or other disposition of such real estate, or any part thereof, to be made under the direction of the Court or one of its officers, or by the guardian of the infant, or by a person appointed by the Court for the purpose, in such manner and with such restrictions as to the Court may seem expedient, and may order the infant to convey the estate as the Court thinks proper.

No sale contrary to devise, etc.

(2) But no sale, lease, or other disposition shall be made against the provisions of a will or conveyance by which the estate has been devised or granted to the infant or for his use. R. S. O. 1887, c. 137, s. 3.

The application to be by next friend or guardian.

4. The application shall be in the name of the infant by his next friend, or by his guardian; but shall not be made without the consent of the infant if he is of the age of fourteen years or upwards, unless the Court otherwise directs or allows. R. S. O. 1887, c. 137, s. 4; Ont. Acts, 1896, c. 6, s. 3.

When a substitute may be appointed to convey.

5. Where the Court deems it convenient that a conveyance should be executed by some person in the place of an infant, the Court may direct some other person in the place of the infant to convey the estate. R. S. O. 1887, c. 137, s. 5.

Debts incurred in behalf of infants to be valid.

6. Every such conveyance, whether executed by the infant or some person appointed to execute the same in his place, shall be as effectual as if the infant had executed the same, and had been of the age of twenty-one years at the time. R. S. O. 1887, c. 137, s. 6.

The Court to direct the application of proceeds. Quality of surplus moneys upon sale of real estate.

7. The moneys arising from such sale, lease, or other disposition, shall be laid out, applied and disposed of in such manner as the Court directs. R. S. O. 1887, c. 137, s. 7.

8. On any sale or other disposition so made, the money raised, or the surplus thereof, shall be of the same nature and character as the estate sold or disposed of; and the heirs, next of kin, or other representatives of the infant, shall have the like interest in any surplus which may remain of the money at the decease of the infant, as they would have had in the estate sold or disposed of, if no sale or other disposition had been made thereof. R. S. O. 1887, c. 137, s. 8.

## APPOINTMENT OF GUARDIANS.

11. The Surrogate Court for the county within which an infant resides, may appoint the father of the infant to be guardian; or may, with the consent of the father appoint some other suitable person or persons; but if the infant is of the age of fourteen years or over, neither of such appointments shall be made without the consent of the infant; or, if the infant has no father living, or any legal guardian authorized by law to take the care of his person and the charge of his estate, the said Court may appoint a guardian or guardians of the infant; and letters of guardianship granted by a Surrogate Court shall have force and effect in all parts of Ontario; and an official certificate of the grant may be obtained as in the case of administration; and a return of every appointment and removal of a guardian shall be made by registrars respectively to the Surrogate Clerk in like manner as is required by The Surrogate Courts Act in the case of grants of probate or administration; but this section shall not be construed as depriving the High Court of jurisdiction in such matters. R. S. O. 1887, c. 137, s. 10.

12. Upon the written application of the infant, or the friend or friends of the infant, residing within the jurisdiction of the Surrogate Court to which application is made, and after proof of twenty days' public notice of the application, in some newspaper published within the county or district of the Surrogate Court to which the application is made, the Judge of the Court may appoint some suitable and discreet person or persons to be guardian or guardians of the infant. R. S. O. 1887, c. 137, s. 11; Ant. Acts, 1892, c. 29, s. 1.

13. Subject to the provisions of the Act respecting the acceptance of certain incorporated companies as sureties, the Judge shall take from every guardian appointed under sections 11 and 12, a bond in the name of the infant, in such penal sum and with such securities, as the Judge directs and approves, having regard to the circumstances of the case, and such bond shall be conditioned that the said guardian will faithfully perform the said trust, and that he, or his executors or administrators, will, when the said ward becomes of the full age of twenty-one years, or whenever the said guardianship is determined, or sooner if thereto required by the said Surrogate Court, render to his ward, or to his executors or administrators, a true and just account of all goods, moneys, interest, rents, profits or other estate of the ward, which shall have come into the hands of the guardian, and will thereupon without delay deliver and pay over to the said ward, or to his executors and administrators, the estate or the sum or balance of money which may be in the hands of the said guardian belonging to the ward, deducting therefrom and retaining a reasonable sum for the expenses and charges of the guardian, and the bond shall be recorded by the registrar of the Court in the books of his office. R. S. O. 1887, c. 137, s. 12.

On death of father, mother to be guardian alone or jointly with others.

14. (1) On the death of the father of an infant, the mother, if surviving shall be the guardian of the infant, either alone, when no guardian has been appointed by the father, or jointly with any guardian appointed by the father.

(2) Where no guardian has been appointed by the father, or if the guardian or guardians appointed by the father is or are dead, or refuses or refuse to act, the High Court or Surrogate Court, or any Judge of either Court, may from time to time appoint a guardian or guardians to act jointly with the mother, as such Court or Judge shall see fit. R. S. O. 1887, c. 137, s. 13.

Mother may appoint guardian in certain cases.

15. (1) The mother of an infant may, by deed or will, appoint any person or persons to be guardian or guardians of the infant after the death of herself, and the father of the infant (if the infant be then unmarried), and where guardians are appointed by both parents they shall act jointly.

(2) The mother of an infant may, by deed or will, provisionally nominate some fit person or persons to act as guardian or guardians of the infant after her death jointly with the father of the infant, and the Court or a Judge after her death, if it be shewn to the satisfaction of the Court or a Judge that the father is for any reason unfitted to be the sole guardian of his children, may confirm the appointment of such guardian or guardians, who shall thereupon be empowered to act as aforesaid, or make such other order in respect of the guardianship as the Court or Judge shall think right. R. S. O. 1887, c. 137, s. 14.

Direction by Court on matters affecting infants.

16. In the event of guardians being unable to agree among themselves or with the father upon a question affecting the welfare of an infant, any of them or the father may apply to the Court for its direction, and the Court or Judge may make such orders regarding the matter in difference as to the Court or Judge seems proper. R. S. O. 1887, c. 137, s. 18.

Removal of guardians.

17. Testamentary guardians and trustees, and guardians appointed or constituted by virtue of this Act shall be removable by the Court or Judge, for the same causes as other guardians and trustees. R. S. O. 1887, c. 137, s. 16.

What Surrogate Court or Judge to act.

18. The Surrogate Court or Judge referred to in sections 1, 14, 15, 16 and 17, is the Surrogate Court or Judge of the county where the infant or respondents, or any of them, reside. R. S. O. 1887, c. 137, s. 17.

#### AUTHORITY OF GUARDIANS.

Guardians authority.

19. Unless where the authority of a guardian appointed or constituted under sections 14 or 15 is otherwise limited, the guardian of any infant appointed or constituted under or by virtue of this Act during the continuance of his guardianship:

- (1) Shall have authority to act for and on behalf of the said ward;  
 (2) May appear in any Court and prosecute or defend any action in his or her name;  
 (3) Shall have the charge and management of his or her estate, real and personal, and the care of his or her person and education;  
 (4) And in case the infant is under the age of fourteen years, may, with the approbation of two of Her Majesty's Justices of the Peace, and the consent of the ward (or in case the infant is not under the age of fourteen years, then with the consent of the ward only), place and bind him or her an apprentice to any lawful trade, profession or employment; the apprenticeship, in case of males, not extending beyond the age of twenty-one years, and in case of females, not beyond the age of eighteen years, or the marriage of the ward within that age. R. S. O. 1887, c. 137, s. 18.

To act for ward.

To appear in actions.

To manage real or personal estate, etc.

To bind ward an apprentice.

Limitation of apprenticeship.

*(2) Payment for Maintenance.*

**965.** An executor will be guilty of a devastavit if he applies the assets in payment of a claim which he is not bound to satisfy: as if he makes disbursements in the schooling, feeding or clothing of the children of the deceased subsequent to his decease.

Executor cannot pay for maintenance.

*Giles v. Dyson*, 1 Stark. N. P. C. 32.

**966.** An executor cannot without risk pay any part of the legacy bequeathed to an infant either to the infant or any person for his use. Therefore the executor was formerly not justified in applying any part of the capital of the legacy for the maintenance or advancement of the child, or for any other purpose than mere necessities without the sanction of the Court. But with respect to the interest of the sum bequeathed, the executor may apply a requisite part of it for the support of the infant legatee without the authority of the testator, if he does no more than the Court would have directed if it had been resorted to in the first instance.

Executor must not pay infant's legacy to infant.

**967.** As to payments for maintenance out of the income, they can be made only when the legacy is vested in possession; not when it is vested and payable in futuro, nor when it is contingent.

Maintenance out of income.

**968.** An executor must be careful not to pay money for the maintenance of an infant until it is clear that on a final settlement of all claims relating to the testator's estate there will be a clear fund out of the income of which maintenance can be provided.

Inter-  
mediate  
mainte-  
nance.

**969.** The gift of a legacy not vested in possession carries with it the right to intermediate maintenance whenever the will either expressly or by implication authorizes the provision of maintenance.

Implica-  
tion of in-  
tention to  
maintain.

**970.** An intention is implied in the absence of directions to the contrary.

1. Where the donor was the father of the legatee, or stood in loco parentis towards him.

2. Where a legacy is given contingently to members of a class of infants (a). If it is inevitable that one or more of the members of a class will ultimately take, or (b), if the consent of all parties who may be ultimately interested in reversion or otherwise, has been obtained.

Advance-  
ment of  
infants.

**971.** By advancement of infants is meant payments made for the purpose of insuring a permanent benefit to an infant generally by establishing him in some profession or career. Advancement out of capital is governed by the rules stated above with regard to maintenance.

Where tes-  
tator par-  
ent or in  
loco par-  
entis.

**972.** Where the testator is the parent or in loco parentis of an infant legatee, whether the legacy be contingent or vested, the interest on the legacy shall be allowed as maintenance from the time of the death of the testator.

Where  
bequest  
vested and  
immedi-  
ate.

**973.** Where a bequest is vested and immediate so that the legatee if he were of age would be entitled to receive his legacy at the end of the year from the testator's death, the Court will order maintenance out of the interest of the legacy, although no express provision be made for the maintenance, and even though

the income be expressly directed to accumulate, provided the parents of the infant legatee are unable to maintain him. No allowance will be made if the parents be of ability. No maintenance will be ordered out of the interest where the legacy is contingent, unless, perhaps, by the consent of the legatees over, in instances where they are competent to give it.

*Evans v. Massey*, 1 Yonge & Jerv. 196.

**974.** A discretion given to executors to apply the interest of a legacy to the maintenance and education of the legatees, nephews, and niece of the testator, is not subject to the control of the court where there is no charge of fraud or the like against the executors.

Discretion  
to execu-  
tors.

*Foreman v. McGill*, 19 Chy. 210.

**975.** Where an infant's fund is in Court or under the control of the Court, a summary order may be granted for the application of it in maintenance, upon a simple notice of motion.

Summary  
application  
for main-  
tenance.

**976.** But if the money is outstanding in the hands of trustees or others, unless they submit to the jurisdiction, summary proceedings are inappropriate.

**977.** And a summary application by the guardian of infants for payment to him or into Court, by the administrator of the estate of the infants' father, of a fund in his hands, was dismissed, where it was opposed by the administrator.

*Re Coutts*, 15 P. R. 162.

Maintenance, devise for.

*Howe v. Carlaw*, 15 O. R. 697.

*Donald v. Donald*, 7 O. R. 669.

Religious education.

*Re Chillman*, 24 O. R. 268. Notes to Holmsted & Langton,  
p. 105.



## CHAPTER VIII.

## DISTRIBUTION SINCE 1ST JULY, 1886.

Original  
power of  
king to  
seize goods  
of an in-  
testate.

**978.** In ancient time when a man died without making any disposition of such of his goods as were testable, it was said that the king, who is *parens patriæ*, and has the supreme care to provide for all his subjects, used to seize the goods of the intestate to the intent that they should be preserved and disposed of for the burial of the deceased, the payment of his debts, to advance his wife and children, if he had any, and, if not, those of his blood.\*

Powers ex-  
ercised in  
County  
Court, and  
as vested  
in ordin-  
ary.

**979.** This prerogative the king continued to exercise for some time by his own ministers of justice, and probably in the County Court, where matters of all kinds were determined; and it was granted as a franchise to many lords of manors, and others who had a prescriptive right to grant administration to their intestate tenants and suitors in their own Courts Baron and other Courts. Afterwards the Crown, in favour of the Church, invested prelates with this branch of the prerogative, for it was said none could be more fit to have such care and charge of the transitory goods of the deceased than the Ordinary, who all his life had the cure and charge of the soul. The goods of the intestate being thus vested in the Ordinary, as trustee, to dispose of them in *pious usus*, it was found that the clergy took to themselves, under the name of the Church and the poor, the whole of the residue of the deceased's estate after the *partes rationabiles* of the wife and children had been deducted, they paying even his lawful debts and charges thereon.

\* Paragraphs 978, 979 and 980 appear *supra* as paragraph 37. It is better to repeat them here in full in order to make a complete statement of the subject of distribution.

**980.** By Stat. Westm. 2 (13 Ed. 1. c. 19), it was <sup>13 Edw. 1. c. 19.</sup> enacted that the Ordinary should be bound to pay the debts of the intestate, as far as his goods extended, in the same manner that executors were bound in case the deceased had left a will.

**981.** However, in Snelling's case, it was resolved <sup>Powers of Ordinary abused.</sup> that if the Ordinary took the goods into possession, he was chargeable with the debts of the intestate at common law, and that the Statute Westminster 2 was made in affirmance of the common law; but, though the Ordinary was either at common law or by force of this statute liable to the creditors for their just and lawful demands, yet the residuum, after payment of debts, remained still in his hands, to be applied to whatever purpose the conscience of the Ordinary should approve. The flagrant abuses of which power occasioned the Legislature to interpose in order to prevent the Ordinaries from keeping any longer administration in their own hands or those of their immediate dependents. Therefore Stat. 31 Edw. III. Stat. 1, c. 2, provides:

"That in case where a man dieth intestate the Ordinaries shall depute of the next and most lawful friends of the dead person intestate to administer his goods, which persons so deputed shall have action to demand and recover as executors the debts due to the said deceased intestate in the King's Court to administer and dispend for the soul of the dead, and shall answer also in the King's Court to others to whom the said deceased was holden and bound in the same manner as executors shall answer, and they shall be accountable to the Ordinaries as executors be in the case of testament as well as of the time past as of the time to come.

**982.** This is the original administrative. They <sup>Original administrative officers.</sup> were the officers of the Ordinary, appointed by him in pursuance of the statute, and their title and authority were derived exclusively from the Ecclesiastical Judge by grants which were denominated letters of administration.

**983.** After the Ordinary was divested of the <sup>Spiritual court takes bonds from administrator.</sup> power of administering an intestate's effects, and compelled to delegate such authority to the relations of the

deceased, the spiritual Court attempted to enforce a distribution, and took bonds of the administrator for that purpose; such bonds were prohibited by the temporal courts, and declared to be void in point of law, on the ground that by the grant of administration the ecclesiastical authority was executed and ought to interfere no further. Thus the administrator was entitled exclusively to enjoy the residue of the testator's effects, after payment of the debts and funeral expenses.

Origin of  
Statute of  
distribution.

**984.** The hardships of this privilege upon those of kin to the intestate, in equal degree with the administrator, was the occasion of making the Statute of Distribution, 22 & 23 Chas. II. c. 10. That statute, after empowering the Ordinary on the granting of administration to take a bond of the administrator, with two or more sureties, proceeds in section 3 to enact as follows: "And also that the said Ordinaries and Judges respectively shall, and may, and are enabled to proceed and call such administrators to account for and touching the goods of any person dying intestate; and, upon hearing and due consideration thereof, to order and make just and equal distribution of what remaineth clear (after all debts, funeral, and just expenses of every sort first allowed and deducted,) amongst the wife or children or children's children, if any such be; or, otherwise, to the next of kindred to the dead person, in equal degree or legally representing their stocks *pro suo cuique jure* according to the laws in such cases and the rules and limitation hereafter set down; and the same distributions to decree and settle and to compel such administrators to observe and pay the same by the due course of his majesty's ecclesiastical laws; saving to every one supposing him or themselves aggrieved their right of appeal as was always in such cases used."

**985.** And by section 5 it is further enacted:

"That all ordinaries, and every other person who by this Act is enabled to make distribution of the surplusage of the estate of any person dying intestate shall distribute the whole surplusage of such estate or estates in manner and form following: that is to

say, one-third part of the said surplusage to the wife of the intestate, and all the residue by equal portions to and amongst the children of such persons dying intestate, and such persons as legally represent such children, in case any of the said children be then dead, other than such child or children (not being heir-at-law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made. And in case any child other than the heir-at-law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share which shall be due to the other children by such distribution as aforesaid; then so much of the surplusage of the estate of such intestate to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal, as near as can be estimated; but the heir-at-law, notwithstanding any land that he shall have by descent or otherwise in the intestate, is to have an equal part in the distribution with the rest of the children without any consideration of the value of the land which he hath by descent or otherwise from the intestate.

And by section 6, "In case there be no children, nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the intestate, the residue of the said estate to be distributed equally to every of the next of kindred of the intestate who are in equal degree, and those who legally represent them."

And by section 7, it is provided, "That there be no representations admitted among collaterals after brothers and sisters children, and in case there be no wife, then all the said estate to be distributed equally to and amongst the children; and in case there be no child, then to the next of kindred in equal degree of or unto the intestate and their legal representatives as aforesaid, and in no other manner whatsoever."

And by section 8 it is likewise enacted, "To the end that a due regard be had to creditors that no such distribution of the goods of any person dying intestate be made till after one year be fully expired after the intestate's death, and that such and every one to whom any distribution and share shall be allotted shall give bond with sufficient sureties in the said Courts, that if any debt or debts truly owing by the intestate shall be afterwards sued for and recovered, or otherwise duly made to appear, that then and in every such case he or she shall respectively refund and pay back to the

administrator his or her rateable part of that debt or debts, and of the costs of suit and charges of the administrator by reason of such debt out of the part and share so as aforesaid allotted to him or her, thereby to enable the said administrator to pay and satisfy the debt or debts so discovered after the distribution made as aforesaid."

Finally, by section 9, it is enacted, "That in all cases where the Ordinary hath used heretofore to grant administration cum testamento annexo he shall continue so to do, and the will of the deceased in such testament expressed shall be performed and observed in such manner as it should have been if this Act had never been made."

Devolution of Estates Act.

**986.** The closing words of section 4 (1) of the Devolution of Estates Act extend to all property, real and personal, of persons dying on and after 1st July, 1886, the rules of distribution theretofore in force for personal property only. The words are "and so far as the said property is not disposed of by deed, will, contract or other effectual disposition, the same shall be distributed as personal property not so disposed of is hereafter to be distributed."

How personal property in Ontario is distributed.

**987.** Personal property in Ontario is distributed according to the rules laid down by the Statute of Distributions, 22 & 23 Chas. II. c. 10. By virtue of chapter 111 of the Revised Statutes of 1897, an Act adopting the law of England in certain matters, the statute of Distributions, with its amendments, became part of the law of Ontario as modified by our Statutes passed since 15th October, 1792.

See *Lamb v. Cleveland*, 19 S. C. R. 83.

**988.** It is necessary therefore to state the rules laid down by 22 & 23 Chas. II. c. 10, amended as just stated:

*First, of the Rights of the Widow.*

Rights of the widow.

**989.** If the intestate leaves children as well as a widow, one-third shall go to the widow and the residue among the children. If there be no children, or lineal descendants of children subsisting, then a moiety shall go to the widow and a moiety to the next of kindred.

**990.** As to estates of persons dying after the 1st July, 1895, the Devolution of Estates Act provides as follows (section 12).

12. (1) The real and personal estate of every man dying, after the first day of July, 1895, intestate and leaving a widow but no issue, shall in all cases where the net value of such real and personal estate does not exceed \$1,000, belong to his widow absolutely and exclusively. Widow entitled to whole estate not exceeding \$1,000. Ont. Acts, 1895, c. 21, s. 2.

(2) Where the net value of the real and personal estate of any person who shall die intestate as in this section mentioned shall exceed the sum of \$1,000, the widow of such intestate shall, after payment of debts, funeral and testamentary expenses, and expenses of administration, be entitled to \$1,000, part thereof absolutely and exclusively, and shall have a charge upon the whole of such real and personal estate, after payment as aforesaid, for such \$1,000, with interest thereon from the date of the death of the intestate at 4 per cent. per annum until payment. Where estate exceeds \$1,000. Ont. Acts, 1895, c. 21, s. 3.

(3) The provision for the widow intended to be made by this section shall be in addition and without prejudice to her interest and share in the residue of the real and personal estate of the intestate, remaining after payment of the sum of \$1,000 and interest as aforesaid, in the same way as if such residue had been the whole of the intestate's real and personal estate, and this section had not been enacted. Widow's share in remainder of estate. Ont. Acts, 1895, c. 21, s. 4.

**991.** Provision is made by the same Act for an election by the widow between the rights thereby conferred and her dower. Election by widow.

4. (2) Nothing in this Act shall be construed to take away a widow's right to dower; but a widow may by deed or instrument in writing, attested by at least one witness, elect to take her interest under this section in her husband's undisposed of real estate, in lieu of all claims to dower in respect of real estate of which her husband was at any time seised, or to which at the time of his death he was beneficially entitled; and unless she so elects she shall not be entitled to share under this section in the undisposed of real estate aforesaid. Saving as to dower.

**992.** Where a widow desires to take, under the Devolution of Estates Act, her interest in the proceeds of her husband's undisposed of real estate, in lieu of dower, she must so elect by an instrument in writing, pursuant Mode of election.

to sec. 4, sub-sec. 2, even where the lands have been sold under an order of the Court at her instance, free from her dower, and the proceeds are in Court.

*Re Galway*, 17 O. R. 49.

Where widow has accepted an equivalent in lieu of dower.

**993.** Section 4 of the Devolution of Estates Act, which gives the widow the right of election, between her dower and a distributive share in her deceased's husband's lands, does not apply where by marriage settlement she has accepted an equivalent in lieu of dower. In such case she has no right to any share in the lands.

*Toronto General Trusts Co. v. Quin*, 25 O. R. 250.

As to election by widow.

See *Reid v. Harper*, 16 O. R. 422, and *Re Ingolsby*, 10 O. R. 283.

**994.** As to application by personal representative to sell free from dower, see paragraph 265 ante.

Widow having received other benefits in other countries.

**995.** Under 58 Vict. ch. 21 (O.), now section 12 of R. S. O. cap. 127, the widow of an intestate who has left no issue is entitled to \$1,000 out of his real estate in Ontario, notwithstanding that she may have received other benefits under the laws of another country out of his estate in that country.

*Sinclair v. Brown*, 29 O. R. 370.

Widow may elect after lands sold by Court.

**996.** When on administration by the Court of the estate of an intestate lands have been sold, the widow, although declared entitled to dower by the judgment, may, though more than a year has elapsed from the death of her husband, elect to take her distributive share in lieu of dower, provided the estate be yet distributed on the footing of her having retained her dower right.

*Baker v. Stuart*, No. (2), 29 O. R. 388, 25 A. R. 445.

*Second, the Rights of the Husband.*

**997.** A husband being entitled to the grant of administration of his wife's effects, was therefore before the Statute of Distributions held entitled, as all administrators were, to the exclusive enjoyment of the residue. Doubts, however, arose whether the husband's right was not superseded by that Statute. The Statute of Frauds, 29 Car. II. c. 3, s. 25, set this doubt at rest by providing that the husband should still continue to hold the right of claiming administration of his wife's estate and to enjoy the benefit of that estate as theretofore.

Rights of husband.

Where husband has renounced, see *Dorsey v. Dorsey*, 30 O. R. 183.

**998.** Section 5 of the Devolution of Estates Act now provides as follows for the distribution of the property of a married woman deceased intestate.

5. The real and personal property whether separate or otherwise, of a married woman in respect of which she dies intestate shall be distributed as follows: One-third to her husband, if she leaves issue, and one-half if she leaves no issue, and subject thereto shall go and devolve as if her husband had pre-deceased her.

Distribution of property of married woman dying intestate.

**999.** Section 4 (3) of the Devolution of Estates Act provides as follows:

(3) Any husband who, if sections 3 to 9 of this Act had not passed, would be entitled to an interest as tenant by the curtesy in any real estate of his wife, may by deed or instrument in writing executed within six months after his wife's death, and attested by at least one witness, elect to take such interest in the real and personal property of his deceased wife as he would have taken if the said sections of this Act had not passed, in which case the husband's interest therein shall be ascertained in all respects as if the said sections had not passed, and he shall be entitled to no further interest under the said sections of this Act. R. S. O. 1887, c. 108, s. 4.

Saving as to husband's interest in property of wife.

**1000.** Before leaving the subject of dower and curtesy, it is well to notice section 59 of the Devolution of Estates Act, which is as follows:

59. The estate of the husband as tenant by the curtesy, or of a widow as tenant in dower, shall not be affected by any of the

Curtsey dower and



estate of  
deed or  
will not  
affected.

Rev. Stat.,  
c. 128.

provisions of the last preceding twenty-two sections of this Act, nor except as provided by section 31 of The Wills Act of Ontario, shall the same affect any limitation of any estate by deed or will, or any estate which although held in fee simple or for the life of another, is so held in trust for any other person, but all such estates shall remain, pass and descend, as if the last twenty-two sections of this Act, numbered from 37 to 58, both inclusive, had not been passed. R. S. O. 1887, c. 108, s. 49.

Effect of  
sections 37  
and 59.

**1001.** Section 37 says that sections 56 to 67 inclusive (therefore including section 59), shall as to the estates of persons dying on or before the 1st day of July, 1896, apply only subject to the provisions of sections 1 to 21 inclusive. Now, section 59 states that with regard to limitations by deed or will estates *pur autre vie* and trust estates, the sections numbered from 37 to 58, both inclusive, do not exist. Therefore the restriction on the construction of section 59 laid down by section 37 does not exist. Hence section 59 is independent of sections 1 to 21. Then how do these estates descend—not under sections 1 to 21, nor under sections 37 to 58. Some amendment is surely necessary in these clauses.

*Third, the Rights of the Children and Lineal Descendants of the Deceased Person.*

Rights of  
children.

**1002.** After the allotment of a third to the widow, the statute directs a distribution of the residue by equal portions to and amongst the children of the intestate, and “such persons as legally represent such children,” in case any of the said children be then dead.

**1003.** In case there be no wife, then by section 7, “all the estate is to be distributed to and amongst the children.”

How far  
represent-  
atives of  
children  
admitted

**1004.** By the words “such as legally represent such children,” their representatives to the remotest degree are admitted; but the term must be understood of descendants, and not next of kin; as, for example, if a son of the intestate is dead, leaving a widow and child,

the widow shall take nothing and the child the whole of the father's share; yet the widow, though not strictly one of the next of kin, is, in the same sense as the child, a legal representative of the personal estate of the father.

*Price v. Strange*, 6 Madd. 161, 162.

**1005.** Where none of the intestate's children are dead after the wife has had the third allotted to her, the remaining two-thirds shall, in pursuance of the statute, be equally divided among all the children of the intestate, <sup>Children all equally entitled.</sup> as in this case they all claim in their own right.

**1006.** A brother or sister of the half-blood are <sup>Half blood.</sup> equally entitled to a share with one of the whole blood inasmuch as they are both equally near of kin to the intestate.

*Smith v. Tracey*, 1 Mod. 209.

**1007.** A posthumous child has also the same rights, <sup>Posthumous child.</sup> but such a child is only to be treated as a born child where such construction is necessary for the benefit of that child.

*Blasson v. Blasson*, 2 De G. J. & Sm. 665.

**1008.** If the intestate leave only one child, such <sup>Intestate leaving only one child.</sup> case is not to be considered as omitted. By the statute, therefore, in case an intestate also leave a wife, she shall only have a third part, and the other two-thirds shall go to such child; and where the intestate leaves an only child, and no widow, although, literally speaking, there can be no distribution, yet such only child shall be entitled to the whole personal estate.

**1009.** Where there is but one person entitled to <sup>Co-heirs take as to tenant in commons. Descendants, etc., born after death of intestate to inherit.</sup> inherit according to the provisions of section 37 and following sections of the Devolution of Estates Act, he shall

\* Descendants and relatives of the intestate begotten before his death, but born thereafter, shall in all cases inherit in the same manner as if they had been born in the lifetime of the intestate and had survived him. P. S. O. 1897, c. 127, s. 57.

Children and relatives who are illegitimate shall not be entitled to inherit under any of the provisions of this Act. R. S. O. 1897, c. 127, s. 58. <sup>Illegitimate persons not to inherit.</sup>

take and hold the inheritance solely; and where an inheritance or a share of an inheritance descends to several persons under such provisions, they shall take as tenants in common in proportion to their respective rights. R. S. O. 1897, c. 127, s. 56.

Result of  
sections 37  
and 56.

**1010.** Inasmuch as sections 38 to 55 are by section 37 declared not to apply to estates of persons dying on or after the 1st day of July, 1886, and as section 56 with other sections following it to 67 inclusive, apply as to estates of such last mentioned persons only subject to the provisions of sections 1 to 21 inclusive, and as there is nothing in sections 1 to 21 inclusive to conflict with section 56, it is presumed that section 56 does apply to the estates of persons dying on or after the 1st day of July, 1886, although it says itself it does not. If it does, it follows on this point the construction of the Statute of Distributions.

Children  
all dead all  
leaving  
issue.

**1011.** Where the intestate's children are all dead, all of them having left children, the parties take per capita, or, in other words, equal shares in their own right.

2 Black Comm. 517.

Some  
children  
dead, some  
living.

**1012.** Where some of the intestate's children are living, and some dead, and such as are dead have each of them left children; in this case, the children of the deceased children take per stirpes, that is to say, not in their own right, but by representation.

Distinc-  
tions be-  
tween  
Dev. of  
Estates  
Act and  
Statute of  
Distrib. as  
to advan-  
cement.

**1013.** Sections 60 to 63 inclusive of the Devolution of Estates Act deal with the subject of advancement. They apply to both real and personal estate. The distinctions between them and the Statute of Distributions should be borne in mind. The Statute of Distributions does not require that there should be any expression by the intestate or the child in writing, and only applies to intestate fathers. Section 60 of the Devolution of Estates Act is more express in its provisions than the

Statute of Distributions. The sections of the Devolutions of Estates Act are as follows:

60. If any child of an intestate has been advanced by the <sup>Causes of</sup> intestate by settlement, or portion of real or personal estate, or both <sup>children</sup> of them, and the same has been so expressed by the intestate in <sup>who have</sup> writing, or so acknowledged in writing by the child, the value <sup>been ad-</sup> thereof shall be reckoned for the purposes of this section only, as <sup>vanced</sup> by settle-  
part of the real and personal estate of such intestate descendible to ment, etc.  
his heirs, and to be distributed to his next of kin according to law; and if such advancement is equal or superior to the amount of the share which such child would be entitled to receive of the real and personal estate of the deceased, as above reckoned, then such child and his descendants shall be excluded from any share in the real and personal estate of the intestate. R. S. O. 1887, c. 108, s. 50.

61. If such advancement is not equal to such share, such child <sup>If such</sup> and his descendants shall be entitled to receive so much only of the <sup>advance-</sup> personal estate, and to inherit so much only of the real estate of the <sup>ment be</sup> intestate, as is sufficient to make all the shares of the children in not equal.  
such real and personal estate and advancement to be equal, as nearly as can be estimated. R. S. O. 1887, c. 108, s. 51.

62. The value of any real or personal estate so advanced shall <sup>Value of</sup> be deemed to be that, if any, which has been acknowledged by the <sup>the property</sup> child by any instrument in writing, otherwise such value shall be <sup>advanced</sup> estimated according to the value of the property when given. R. S. O. <sup>how esti-</sup> 1887, c. 108, s. 52. mated.

63. The maintaining or educating, or the giving of money to a <sup>Education,</sup> child, without a view to a portion or settlement in life shall not be <sup>etc., not</sup> deemed an advancement within the meaning of this Act. R. S. O. <sup>advance-</sup> 1887, c. 108, s. 53. ment.

**1014.** The end and intent of the statute was to <sup>Advance</sup> make provision for all the children of the intestate <sup>ment.</sup> equally as near as could be estimated. Accordingly the 5th section of the statute proceeds to provide that no child of the intestate, except the heir-at-law, who shall have any estate in land by the settlement of the intestate, or who shall be advanced by the intestate in his lifetime by pecuniary portion equal to the distributive shares of the other children, shall participate with them in the surplus; but if the estate so given to such child by way of advancement be not equivalent to their shares, then such part of the surplus as shall make it so shall be allotted to them and their heirs.

Mother's  
property  
not  
brought  
ought into  
hotch pot.

**1015.** This provision applies only to the distribution of the estate of the intestate father; and, therefore, if a mother, being a widow, advances a child and dies intestate, leaving many children, the child advanced shall not bring what he received from his mother into hotch-pot.

*Bennet v. Bennet*, 10 C. D. 474.

See paragraph 1013 above.

Child may  
keep ad-  
vanced  
property.

**1016.** The statute takes nothing away that has been given to any of the children, however unequal that may have been, how much soever it may exceed the remainder of the personal estate left by the intestate at his death, the child may, if he pleases, keep it, and if he be not contented, but would have more, then he must bring into hotch-pot what he has before received.

Statute  
only ap-  
plies where  
actual  
intestacy.

**1017.** The provision in the statute applies only to the case of actual intestacy; and where there is an executor, and, consequently, a complete will, though the executor may be declared a trustee for the next of kin, they take as if the residue had been actually given to them. Therefore a child advanced by his father in his lifetime, or provided for in the will, cannot be called upon to bring his share into hotch-pot.

*Stewart v. Stewart*, 15 C. D. 539.

Grand-  
children  
must bring  
in parents'  
advance-  
ment.

**1018.** If a child who has received any advancement from his father shall die in his father's lifetime leaving children, such children shall not be admitted to their father's distributive share unless they bring in his advancement, since, as his representatives, they can have no better claim than he would have had if living.

*Proud v. Turner*, 2 P. Wins. 560.

No benefit  
to widow  
by ad-  
vance-  
ment.

**1019.** A child advanced in part shall bring in his advancement only among the other children, for no benefit shall accrue from it to the widow.

*Kirkeudbright v. Kirkeudbright*, 8 Ves. 51, 64.

**1020.** The statute extends not only to land settled <sup>Charges may be advanced.</sup> upon a younger child by the father; but also to charges upon land for such child; so if the father settle a rent out of his land on a younger child it is within the statute, and so is a reversion settled upon any child but the heir.

*Edwards v. Freeman*, 2 P. Wms. 442.

**1021.** A provision made for a child by a settlement, whether voluntary or for a good consideration, <sup>Advances under settlement.</sup> as that of marriage, is an advancement.

*Phiney v. Phiney*, 2 Vern. 638.

**1022.** It is not requisite to constitute an advancement <sup>Advances by deed,</sup> that the provision should take place in the father's lifetime. If by deed he settle an annuity to commence after his death on one of his children, it is an advancement; so a portion secured to the child, although in futuro, is an advancement. Thus a portion for a daughter, to be raised out of land on her attaining the age of 18, or the day of her marriage, was held to be an advancement to her when she married, although she was under that age and unmarried at the time of the intestate's death.

*Edwards v. Freeman*, 2 P. Wms. 445.

**1023.** A portion which was at first contingent <sup>Contingent portions.</sup> shall clearly be considered an advancement when the contingency has happened. But the contingency must be limited as necessary to arise within a reasonable time, and the contingency must be valued.

**1024** With respect to the sort of benefit which <sup>Offices.</sup> shall constitute an advancement, it has been held that if a father buy for a son any office, civil or military, this is to be considered as an advancement, either partial or complete, according to the comparative value of the estate to be distributed.

*Pusey v. Desbouverie*, 3 P. Wms. 317.

Annuities

**1025.** An annuity is an advancement to be brought into hotch-pot, namely, the value at the date of the grant. On the other hand, small, inconsiderable sums of money given to the child by the father, or mere trivial presents, he may make to a child, as of a gold watch, or wedding clothes, are not to be deemed an advancement; nor shall money expended by the father for the maintenance of a child, nor given to bind him apprentice, nor laid out in his education at school, at the university, or on his travels.

Presents not an advancement.

*Taylor v. Taylor*, L. R. 20 Eq. 155.

*Fourth, the Rights of the Next of Kin of the Intestate.*

Rights of next of kin.

**1026.** The 6th section of the Statute of Distributions provides that in case there be no children, or legal representatives of them in existence, a moiety of the intestate's estates shall be allotted to his widow, and the residue shall be distributed equally among his next of kin in equal degree and their representatives. And by the 7th section, in case there be neither wife nor children, then all the estate shall be distributed among the next of kin in equal degree; but the same section enacts that there shall be no representatives admitted among collaterals after brothers' and sisters' children.

How next of kin ascertained

**1027.** It becomes necessary to inquire who are the "next of kin." Proximity is settled according to the rules of the Civil Law.

**1028.** The next of kin referred to by the statute are to be ascertained by the same rules of consanguinity as those which determine who are entitled to letters of administration.

Consanguinity.

**1029.** Consanguinity, or kindred, is defined as the connection or relation of persons descended from the same stock. This consanguinity is either lineal or collateral.

**1030** Lineal consanguinity is that which subsists <sup>Lineal consanguinity.</sup> between persons of whom one is descended in a direct line from the other, as between the Propositus and his father, grandfather, great-grandfather, and so upwards in the direct ascending line, or between Propositus and his son, grandson, great-grandson, and so downwards in the direct descending line. Every generation in this lineal direct consanguinity constitutes a different degree, reckoning either upwards or downwards. The father of the Propositus is related to him in the first degree, and so, likewise, is his son; his grandsire and grandson in the second; his great-grandsire and great-grandson in the third. This is the only natural way of reckoning the degrees in the direct line; and therefore universally obtains as well in the civil and canon as in the common law. This lineal consanguinity, it may be observed, falls strictly within the definition of *vinculum personarum ab eodem stipite descendit*; since lineal relations are such as descend one from the other, and both, of course, from the same common ancestor.

2 Black Comm. 203.

**1031.** Collateral kindred answers to the same <sup>Collateral kindred.</sup> description; collateral relations agreeing with the lineal in this that they descend from the same stock or ancestor; but differing in this that they do not descend one from the other. Collateral kinsmen are such then as literally spring from one and the same ancestor, who is the stirps, or root, the stipes, trunk or common stock, from whence these relations are branched out. As if John Stiles has two sons, who have each a numerous issue; both these issues are lineally descended from John Stiles as their common ancestor; and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them consanguineos.

2 Black Comm. 204.

**1032.** It must be carefully remembered that the <sup>Collateral consanguinity.</sup> very being of collateral consanguinity consists in this



descent from one and the same ancestor. Thus, Titius and his brother are related; why? because both are derived from one father. Titius and his first cousin are related; why? because both are descended from the same grandfather; and his second cousin's claim to consanguinity is this: that they are both derived from one and the same great-grandfather. In short, as many ancestors as a man has, so many common stocks he has, from which collateral kinsmen may be derived.

2 Black. Comm. 205.

How degrees are counted.

**1033.** The mode of calculating the degrees in the collateral line for the purpose of ascertaining who are the next of kin, conforms, as it has been above observed, to that of the civil law, and is as follows: To count upwards from either of the parties related to the common stock, and then downwards again to the other, reckoning a degree for each person, both ascending and descending; or, in other words, to take the sum of the degrees in both lines to the common ancestor.

2 Black. Comm. 207.

*Brown v. Farndell*, Carth. 51.

Distinctions from common law rules as to succession to inheritances.

**1034.** Several distinctions may be observed, with reference to the corresponding rules of the common law, respecting succession to inheritances.

1st. Relations by the father's side and the mother's side are in equal degree of kindred, for, in this respect, dignity of blood gives no preference. Hence it may happen that relations are distant from the intestate by an equal number of degrees, who are no relation at all to each other.

2nd. The half-blood are kindred of the intestate, and have been excluded from the inheritance of land only on feudal reasons. Therefore, brothers and sisters of the half-blood are entitled to an equal share of the intestate's estate with the brothers and sisters of the whole blood, and the brother of the half-blood shall exclude the uncle of the whole blood.

2 Black. Comm. 505.

3rd. As younger children must stand in the same degree of kindred as the eldest, primogeniture can give no right to preference.

*Warwick v. Greville*, 1 Phillim. 124.

4thly. The right to administration will follow the proximity of kindred though ascendant; and therefore, when a child dies intestate, without wife or child, leaving a father, the father was formerly entitled to the personal effects of the intestate as the next of kin, exclusive of all others. Indeed, anciently, that is in the reign of Henry I., a surviving father could have taken even the real estate of his deceased child. But this law of succession was altered soon afterwards, for we find by Glanville that in the time of King Henry II. the father could not take the real estate of his deceased child, the inheritance being then carried over to the collateral line; and it was subsequently held an inviolable maxim that an inheritance could not ascend; but this alteration of the law never extended to personal estate. So if a man dies intestate, leaving no nearer relations than a grand-father or grandmother, and an uncle or aunt, the grand-father or grandmother being in the second degree though ascendant will be entitled to the exclusion of the uncle or aunt who are related only in the third degree. So a great-grandmother is equally entitled as an aunt.

*Lloyd v. Tench*, 2 Ves. Sen. 215.

However, though the ecclesiastical law of England acknowledges the rights of ascendants generally, yet it does not recognize them to the extent of the civil law, according to which ascendants of whatever degree shall be preferred before all collaterals, except in the case of brothers and sisters. But our law prefers the next of kin, though collateral, before one who, though lineal, is more remote.

*Stanley v. Stanley*, 1 Atk. 458.

5thly. Those in equal degree are equally entitled, whether males or females.

**1035.** The preference of males to females which exists in the succession to inheritances seems to have arisen entirely from the feudal law; and has never been applied to rights respecting personal estate.

Excep-  
tions to  
rule of  
computa-  
tion as to  
proximity  
of kind-  
red.

**1036.** It remains to notice certain exceptions to the rule of computation above stated, of the proximity of kindred.

1st. The parents of an intestate are as near akin to him as his children; for they are both in the first degree; but in our law children are allowed the preference, and so are their lineal descendants to the remotest degree.

*Evelyn v. Evelyn*, Anbl. 192.

2nd. Where the nearest relations, according to the above computation, are a grandfather or a grandmother and brothers or sisters of the intestate, although these are all related in the second degree, yet the latter are entitled to the exclusion of the former.

Father  
only sur-  
viving.

**1037.** By section 6 of the Devolution of Estates Act when a person shall die without leaving issue and intestate as to the whole or any part of his real or personal property, his father surviving shall not be entitled to any greater share under the intestacy than his mother or any brother or sister surviving; nor shall a grandfather or grandmother of a person dying intestate share in competition with a surviving father, mother, brother or sister.

Distribu-  
tion of es-  
tate of per-  
son dying  
intestate  
and with-  
out issue.

**1038.** It was held in *Re Colquhoun*, 26 O. R. 104, that on the death of a person intestate, leaving no issue, the children of a predeceased sister or brother were not entitled under section 6 of the Devolution of Estates Act, to share in competition with a surviving father, mother, brother or sister of the intestate, but *re Colquhoun* was overruled by *Walker v. Allen*, 24 A. R. 336, and it is there laid down that where brothers and sisters share in an intestacy children of deceased brothers and sisters also share *per stirpes*.

Re-capi-  
tulation.

**1039.** To recapitulate, in the first place, the children and their lineal descendants to the remotest degree; and

on failure of children, the parents of the deceased are entitled, then follow brothers and sisters, then grandfathers and grandmothers, then uncles or nephews, great-grandfathers and great-grandmothers, and lastly cousins.

**1040.** If a man dies intestate without a child, but leaving a widow and a father, then the personal estate shall go in moieties between the wife and father.

Widow  
and father  
surviving.

*Kellray v. Kellray*, Gill, Eq. Cas. 190.

**1041.** So, with respect to the mother, before the statute of 1 Jac. II. c. 17, if a child had died intestate, without a wife, child or father, his mother was entitled as his next of kin in the first degree to his whole personal estate. But by that statute, section 7, it is enacted, "that if, after the death of a father any of his children shall die intestate without wife or children in the lifetime of the mother, every brother and sister and the representatives of them shall have an equal share with her." The principle of this provision is that otherwise the mother might marry and transfer all to another husband.

How  
mother,  
brothers  
and sisters  
take.

*Blackborough v. Davis*, 1 P. Wms. 49.

**1042.** If the intestate left neither wife nor child nor father, and there be neither brother or sister nor nephew or niece, the case is without the statute, and the whole of such intestate's effects shall devolve, as before the statute, to his mother.

When  
mother  
takes.

*Jackson v. Prudchome*, MS. 11, Vin. Abr. 196.

**1043.** It is clear that the mother-in-law or step-mother of an intestate, not being of his blood, can claim nothing under the Statute of Distributions.

Mother-in-  
law and  
step-moth-  
er cannot  
take.

*Rutland v. Rutland*, 2 P. Wms. 216.

**1044.** If the intestate left neither children nor parents, but his nearest surviving relations be brothers and sisters and grandfather and grandmother, then the brothers and sisters are preferred to the grandfather and grandmother.

Brothers  
and sister  
preferred  
to grand-  
mother or  
grand-  
father.

Grand-mother or grandfather preferred to uncles or aunts.

**1045.** Nevertheless, if the intestate leaves no nearer kindred than a grandfather or a grandmother, and uncles and aunts, the grandfather or grandmother being in the second degree, will be entitled to the whole personal estate, exclusive of the uncles or aunts who are only in the third degree.

*Woodruff v. Wickworth*, Prec. Chan. 527.

Great-grand-fathers.

**1046.** Hence, also, great-grandfathers or great-grandmothers, being in the third degree, are entitled to a distributive share with uncles and aunts.

*Lloyd v. Trench*, 2 Ves. Sen. 215.

Grand-father ex-paternal and grand-mother ex-maternal.

**1047.** Where the intestate leaves a grandfather by the father's side, and a grandmother by the mother's side, his next of kin, they shall take in equal moieties as being in equal degree, for here dignity of blood is not material.

Aunts and nieces; uncles and nephews.

**1048.** Aunts and nieces, uncles and nephews, being all in the third degree, are all equally entitled. Hence, where the intestate left two aunts and a nephew and a niece, children of a deceased brother, Lord Hardwicke ordered the surplus to be divided into four equal parts equally among them, holding that as they were all in equal degree, the children were to take in their own right, and not by representation; but that if their father had been living he would have been entitled to the whole.

*Bulstiers v. Albert*, 2 Cas. Temp. Lee, 51.

Affinity gives no title.

**1049.** Affinity or relationship by marriage, except in the instance of the wife of the intestate, gives no title to a share of his property under the statute. Therefore if the intestate had a son and a daughter, and they both die, the former leaving a wife and the latter a husband; upon the intestate's death afterwards, such husband and wife have neither of them any claim on the estate.

No representation after brothers' and sisters' children.

**1050.** The seventh section of the Statute of Distributions provides that there shall be no representation admitted among collaterals after brothers' and sisters' children. This provision must be construed to mean brothers

and sisters of the intestate, and not as admitting representation, when the distribution happens to fall among brothers and sisters who are remotely related to the intestate, for the intestate is the subject of the Act; it is his estate, his wife, his children, and for the same reason his brothers' and sisters' children; for he is equally correlative to all. Therefore, if the intestate should leave an uncle and the son of another uncle deceased, the latter shall have no distributive share. So, if the next of kin of the intestate should be nephews and nieces, a child of a deceased nephew or niece will not be admitted to share in the distribution.

**1051.** If the intestate's brothers and sisters were at the time of his decease all dead, and having left children, such children shall all take per capita. Therefore, if an intestate leave a deceased brother's only son, and ten children of a deceased sister, the ten children of the deceased sister shall take ten parts in eleven with the son of the deceased brother. But in the event of some of the intestate's brothers and sisters being alive and some dead, and such as are dead having left children, such children take per stirpes by way of representation. Therefore, if an intestate left a brother alive and ten children of a deceased sister, such ten children will take one moiety of the personal estate, and their uncle the other.

Children  
of deceased  
brother  
and sister  
take per  
capita.

*Regley v. Cook*, 3 Drew, 662.

*Fifth, of the Distribution when the Intestate was Domiciled Abroad*

**1052.** The distribution of the personal estate of the intestate is to be regulated by the law of the country in which he was a domiciled inhabitant at the time of his death, without any regard whatsoever to the place either of the birth or of the death, or the situation of the property at that time. It is part of the law of Ontario that personal property should be distributed according to the *jus domicilii*. If, therefore, a man die domiciled in this

Persona  
property  
distributed  
by *jus*  
domicilii.

country, and administration be taken out to him here, debts due to him or other of his personal effects, abroad, shall be distributed according to the law of Ontario for the *lex loci rei sitae* is not to be recognized. On the other hand, if a man domiciled abroad die intestate his whole property here is distributed according to the laws of the country where he was so domiciled. A man's domicile is *prima facie* the place of his residence; but this may be rebutted by showing that such residence is either constrained from the necessity of his affairs or transitory.

*Whicker v. Hume*, 7 H. L., 161.

*Sixth, of the Payment of the Residue.*

Distribu-  
tion of  
residue.

**1053.** Although the eighth section of the statute enacts that no distribution of an intestate's effects shall be made until one year be expired after his death, yet if a person entitled to a distributive share shall die within the year such interest shall be considered as vested in him, and shall go to his personal representatives for this proviso makes no suspension or condition precedent to the interest of the parties, but was inserted merely with a view to creditors.

**1054.** The statute also is in the nature of a will framed by the Legislature for all such persons as die without having made one for themselves, and by consequence the parties entitled in distribution resemble a residuary legatee, and it has been always held that if such legatee dies before the amount of the surplus is ascertained, still his representative shall have the whole residue, and not the representative of the first testator.

**1055.** Under the wording of section 4 (1) of the Devolution of Estates Act, it would seem to be reasonably clear that, as already stated, the real and personal estate of persons dying intestate on or after 1st July, 1886, shall be distributed according to the rules laid down for the distribution of personal estate. In the preceding paragraphs these rules have been fully explained.

**1056.** Doubts have been expressed whether these rules are to govern. In order to understand these doubts it is necessary to state the provisions of section 10 of the Devolution of Estates Act. They are as follows:

When any portion of the real estate of a person dying on or after the first day of July, 1886, vests in his personal representatives under this Act, such personal representatives in the interpretation of any statute of this Province, or in the construction of any instrument to which the deceased was a party, or in which he is interested shall, while the estate remains in them be deemed in law his heirs, as respects such portion, unless a contrary intention appears, but nothing in this section contained shall affect the beneficial right to any property, or the construction of words of limitation of any estate in or by any deed, will or other instrument. Ont. Stats. 1897, c. 14, s. 31.

**1057.** Section 31 of the Wills Act (R. S. O. 1897, chapter 128, is as follows.

Where any real estate is devised by any testator dying on or after the 5th day of March, 1880, to the heir or heirs of such testator, or of any other person, and no contrary or other intention is signified by the will the words "heir" and "heirs" shall be construed to mean the person or persons to whom such real estate would descend under the law of Ontario in case of an intestacy. R. S. O. 1887, c. 109, s. 31.

**1058.** Thus, when under a will, the words "heir" or "heirs" are used, it becomes also necessary to know the true interpretation of section 4 (1) of the Devolution of Estates Act.

**1059.** The difficulty arises as follows. Although section 4 (1) of the Act seems to apply the Statute of Distributions to all property real and personal, section 13 (1) of the Act vests the real estate in default of caution in the devisees "or heirs." Section 15 preserves the rights of "non-consenting heirs." Section 16 also mentions "heirs who do not concur" in a sale. Section 19 also recognizes possible claims of "heirs" as against purchasers.

**1060.** "Heirs" is undoubtedly a technical term meaning the parties who are entitled to land by descent as opposed to persons entitled to the personal estate who are not in law called "heirs." The Act, therefore, it is



argued, contains intrinsic evidence that its own provision (section 4 (I)) may under some circumstances not be applicable.

**1061.** Before 1st July, 1886, there were in force certain rules of descent for real estate. By section 37 of the Devolution of Estates Act these rules are declared to be no longer in force.

**1062.** These last-mentioned rules (known as the Statute of Victoria) being abolished, is there a revival of an earlier stage known as the Statute of William, or a still earlier stage known as the rules of the Common Law?

**1063.** The intention of the Legislature is no doubt contained in section 4 (I), and the absurdities which result from a strict construction of the word "heirs" will probably lead to a continuance of the present practice of conveyancers, which is to adopt without question the rules of the Statute of Distributions. The Act is not happily expressed, and the doubt raised is reasonable and fair

See 17 C. L. T. pp. 246, 267, 270.

My own  
right heirs.

**1064.** "My own right heirs."—A testator, who left him surviving his widow and one daughter, devised specifically described property to his daughter, and the residue of his estate to his executors upon trust for his widow and daughter in certain events with limited power to the daughter to dispose thereof by will. He then directed that "in case my daughter shall have died without leaving issue her surviving and without having made a will as aforesaid, my trustees shall (after the death of my wife if she survive my said daughter) sell all my estate, real and personal and divide the same equally amongst my own right heirs, who may prove to the satisfaction of my said trustees their relationship within six months from the death of my said wife or daughter, whichever may last take place.

The daughter died unmarried in her mother's lifetime, having made a will assuming to dispose of the residue.

Held, that the daughter was entitled to take as the "right heir" of the testator.

*Coutsworth v. Carson*, 1 A. R. 24.

**1065.** "My lawful heirs." The general rule that where a testator devises property to his "heirs" the heirs are to be ascertained at the time of his death, is not affected by the fact that the person answering that description is the taker of a preceding particular interest under the will. My lawful heirs.

\* Where, therefore, a testator after a gift to his wife and only child for their joint lives and to the survivor for life directed that "at the decease of both, the residue of my real and personal property shall be enjoyed by both and go to the benefit of my lawful heirs," the child was held entitled to the residue.

*Thompson v. Smith*, 23 A. R. 29.

**1066.** "Failure of Issue."—By his will, testator devised to his son the use of and during his lifetime certain land, but if he died without issue, then it was to be equally divided between two named grandsons, and by a subsequent clause, on the death of testator's widow, he directed that the said land and all other property not bequeathed by his will should be equally divided amongst all his children. The son died, leaving issue, his mother predeceasing him. Failure of issue.

Held, that under R. S. O. ch. 109, sec. 32, the failure of issue referred to was a failure during the son's lifetime or at his death and not an indefinite failure, and that by virtue of a subsequent clause he took a life estate and not an estate tail by implication, and that on the termination of the life estate the lands fell in and formed part of the residue.

*Martin v. Chandler*, 26 O. R. 81.

Nearest of  
kin : time  
of ascer-  
taining.

**1067.** In the absence of any controlling context, the persons entitled under the description "nearest of kin" in a will are the nearest blood relations of the testator at the time of his death in an ascending and descending scale.

And where the testator devised his farm to his only child, a daughter, giving his widow the use of it until the daughter became of age or married, provided that in the event of the latter dying without issue "then in that case" it should be equally divided between his "nearest of kin," and the daughter died while still an infant and unmarried.

Held, that although the persons intended by the description took only in defeasance of the fee simple given to the daughter alone in the first instance, she was nevertheless entitled as one of "the nearest of kin" and the widow, as heiress-at-law of the daughter, and the father and mother of the testator, were each entitled to an undivided one-third in fee simple as tenants in common.

*Bullock v. Downes*, 9 H. L. C. 1; *Mortimore v. Mortimore*, 4 App. Cas. 448; and *Re Ford, Patten v. Sparks*, 72 L. T. N. S. 5, followed.

The word "then" introducing the ultimate devise, was not used as an adverb of time, but merely as the equivalent of the expression "in that case" which followed it, and did not affect the construction of the will.

*Brabant v. Lalonde*, 26 O. R. 379.

Mode of  
division.

**1068.** A testator who died in 1840, by his will made in year, devised all his property to certain persons as executors and trustees upon trust for the maintenance and support of his wife and unmarried daughters, as long as they should continue unmarried, and live with his widow, and then directed that "when my beloved wife shall have departed this life, and my daughters shall have married or departed this life, I direct and require my trustees and executors to convert the whole of my estate into money to the best advantage by sale

thereof, and divide the same equally among those of my said sons and daughters who may be then living, and the children of my said sons and daughters who may have departed this life previous thereto."

Held, that the division must be per stirpes and not per capita.

*Wright v. Bell*, 18 A. R. 25.

**1069.** A testator, who died on the 8th of November, 1867, by his will, made on the 15th of October, 1867, devised lands in Ontario to his wife until her death or marriage, and upon her death or marriage to his son, "should he be living at the happening of either of said contingencies," and if not then living "unto the heirs of the said (son)." The son died in July, 1885, intestate and unmarried, and the widow died in February, 1887.

Construc-  
tion of  
word  
"heir."

Held, that the Act abolishing heirship by primogeniture, 14 & 15 Vict. ch. 6, applied, and that all the brothers and sisters of the son were his "heirs," and entitled to take under this devise.

*Tyler v. Deal* (1873), 19 Gr. 601, and *Baldwin v. Kingstone* (1890), 18 A. R. 63, distinguished.

*Sparks v. Wolff*, 25 A. R. 326.

**1070.** The testatrix devised and bequeathed all her real and personal estate (except her ready money) to one M. for life; and upon the death of M. she directed that all her real and personal estate should be sold; and the proceeds thereof, together with all her other moneys, she bequeathed to (among others) the sons and daughter of her sister M. A. There were at the date of the will two daughters of M. A. living. Held, that parol evidence was admissible to show that the testatrix intended to benefit only one of the daughters; and that the evidence showed that she intended to exclude the other. Held, also that the division of the ready money was postponed until the death of M., the tenant for life.

Postpone-  
ment of  
division.

*McIntosh v. Bessy*, 26 Chy. 4, 5.

Period of  
distribu-  
tion.

**1071.** Testator devised all the rents and profits of her estate to C., an unmarried daughter, so long as she remained unmarried; and upon her marriage the whole to be divided between her and her four sisters, but if she died unmarried the division must be among her four sisters; and in case of either of these four dying before the marriage or death of C., the share of the one so dying was to go to the children. Then followed a provision that in case of the death of any of her said daughters, without leaving child or children, the share of such daughter was to be divided among the surviving daughters and the children of deceased daughters. Held, reversing the decree of the Court of Chancery (26 Chy. 310), that it was the intention of the testatrix that there should be a distribution of the estate upon the marriage of C., and that on the event happening each of the daughters took an immediate absolute interest.

*Munro v. Smart*, 4 A. R. 449.

Period of  
distribu-  
tion.

**1072.** A testator, in 1856, devised certain land to M., and in case of her death without issue, then to the heirs C. and E. "to be equally divided between them." C. died after the testator, leaving five children. M. died after C. without issue. E. survived at the date of the hearing, having one child living. Held, that the period of distribution was upon the death of the first taker, M., so that those were entitled who were then the heirs of C. and E., and that they took per capita and not per stirpes.

*Sauter v. Johnson*, 22 Chy. 249.

Period of  
distribu-  
tion.

**1073.** A testator devised his lands to his wife "to have and to hold the said premises with appurtenances unto the said J. S., for and during her natural life, and afterwards unto the surviving children of my cousin T. S. S., to be divided share and share alike." Held, that the period of distribution was after the death of the tenant for life—the wife; and that the children of T. S. S. who were living at that date, or their issue, were the only parties entitled to the estate.

*Smith v. Coleman*, 22 Chy. 561.

**1074.** By a will of personal estate, after a life <sup>Heirs at law.</sup> estate had been given to the testator's widow, it was provided by a residuary clause that the property should be sold and the proceeds equally distributed among the testator's nephews and nieces, such bequests on the death of any of them entitled to the same previously to the period of distribution to go to their "heirs-at-law." At the time of this action the widow of the testator was still alive, but some of the nephews and nieces had died. Held, that the will gave a vested interest to such nephews and nieces as should be alive at the time of the testator's death, but the period of distribution was the death of the widow; and the bequest to the nephews and nieces was subject to be divested as to those of them who should die before the said period of distribution, in favor of their representatives, who were entitled to take in substitution for the original legatee, and, *Semble*, for this reason it was to be inferred that by "heirs-at-law" the testator meant to express that the benefit was to go to the persons who would inherit the personal estate—that is to say, the next of kin.

*Harrison v. Spencer*, 15 O. R. 692.

The next of kin as to personalty stand in the same position as the heir-at-law, as to realty.

*Underwood v. Wing*, 4 De G. M. & G. 633.

Statute of Distributions.

*Arkell v. Roach*, 5 O. R. 699.

"Poor relations"—Heirs at law.

*Ross v. Ross*, 25 S. C. R. at p. 330.

Death caused by devisee.

*Lundy v. Lundy*, 24 S. C. R. 650.

Advancement of child.

*Re Hall*, 14 O. R. 557.

Charge on Land.

*Moore v. Mellish*, 3 O. R. 174.

## TABLE OF DISTRIBUTION.\*

<i>If the Intestate die leaving :</i>	<i>His representatives take thus :</i>
Wife and child or children . . . .	{ One-third goes to wife, rest to child or children ; if children dead, then to their lineal descendants, except such child or children (not heirs-at-law) who had estate by settlement of intestate or were advanced by him in his lifetime equal to the others shares. (989)
Wife only . . . . .	{ \$1,000 to wife, rest half to wife and half to next of kin in equal degree to intestate or their legal representatives, or if no next of kin to Crown. As to rights of wife to extent of \$1,000, see paragraph 990.
No wife or child . . . . .	{ All to the next of kin, and to their legal representatives. (985).
Child, children or their representatives . . . . .	{ All to him, her or them. (1003).
Children by two wives . . . . .	{ Equally to all (all being equally of kin).
If no child, children or representatives . . . . .	{ All to next of kin, in equal degree to intestate. (1026).
Child and grandchild by deceased child . . . . .	{ Half to child, half to grandchild, who takes by representation. (1004).
Husband only . . . . .	{ Half to him and half as if he had predeceased intestate. (998).
Husband and child or children . . . . .	{ One-third to husband and two-thirds to children. (998).
Father and mother . . . . .	{ Half to each. (1037).
Father, mother, brother or sister . . . . .	{ Equally to all. (1037).
Mother and brother or sister . . . . .	{ Whole to them equally. (1041).
Wife, mother, brother, sister, and nieces or nephews . . . . .	{ Half to wife, residue to mother, brothers, sisters and nieces, but nephews and nieces take <i>per stirpes</i> . (1038.)
Wife and father . . . . .	{ Half to each. (990), (1040).
Wife, mother, nephews and nieces . . . . .	{ One-half to wife, one-fourth to mother, and one-fourth to nephews and nieces per capita. (990), (1041).
Wife, brother or sister and mother . . . . .	{ Half to wife, half to brothers and sisters and mother equally. (990), (1041).
Father only . . . . .	{ The whole. (1034).
Mother only . . . . .	{ The whole. (1042).
Wife and mother . . . . .	{ Half to wife and half to mother. (990), (1042).
Brother and sister only . . . . .	{ The whole equally. (1039).
Brother and sister and wife . . . . .	{ Half to wife, half to brother and sister equally. (990), (1039).

\*References in brackets to paragraphs.

*If the Intestate die leaving :**His representatives take thus :*

Brother or sister of whole blood, and brother and sister of half blood .....	} Half to each. (1006), (1034).
Posthumous brother or sister, and mother .....	
Posthumous brother or sister, and brother or sister born in lifetime of father.....	} Half to each. (1007).
Father's father and mother's mother .....	
Uncle's or aunt's children, and brother's or sister's grand- children .....	} All equally. (1050),
Grandfather and grandmother, uncle or aunt .....	
Two aunts, nephew and niece....	All equally. (1048).
Uncle and deceased uncle's child..	All to uncle. (1050).
Uncle by a mother's side, and deceased uncle's or aunt's child .....	} All to uncle. (1050).
Nephew by brother, and nephew by half-sister .....	
Brothers or sisters, and nephews or nieces .....	} Nephews or nieces take <i>per stirpes</i> , others equally. (1050).
Nephew by deceased brother, and nephews and nieces by deceased sister.....	
Nephews and nieces, uncles and aunts .....	} All equally. (1048).
Brother or sister and grandfather..	
Brother's grandson and brother or sister's daughter.....	} All to daughter.
Brother and two aunts .....	
Brother and wife .....	Half to each. (989).
Mother and brother .....	Equally. (1041).
Wife, and mother, and children of deceased brother or sister..	} Half to wife, one-fourth to mother, one-fourth to deceased brother's or sister's children <i>per stirpes</i> . (989), (1026), (1041).
Wife, brother or sister, and children of deceased brother or sister.....	
Brother or sister and children of a deceased brother or sister..	} Half to brother or sister <i>per capita</i> , half to children of deceased brother or sister <i>per stirpes</i> . (1013), (1026), (1038).
Grandmother and sister .....	
Cousins of same degree.....	Equally <i>per capita</i> .



## CHAPTER IX.

## OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR WITH RESPECT TO HIS OWN ACTS.

Liability  
of execut-  
or.

**1075.** The executor may be sued as executor on a promise made by him as executor, and such promise will charge the defendant no further than a promise of the testator.

Wms. p. 1661.

Promise by  
executor.

**1076.** In actions which are brought against an executor, in the character of executor, to recover the demand out of the testator's estate, a promise by the executor is a mere nudum pactum if there were no assets.

*Runn v. Hughes*, 7 T. R. 350.

Personal  
liability of  
executor.

**1077.** A promise by an executor or administrator to pay a debt of the testator, or to answer damages, will not make him personally liable unless there be a sufficient consideration to support the promise. For a bare promise by the executor does not make him liable out of his own estate, but he is still chargeable only as executor, and to the extent of the assets in his hands, in the same manner as he would have been had no such promise been made. By the Statute of Frauds the executor or administrator will not be liable, unless the promise is in writing, but although the promise be in writing it is of no more effect since the statute than before, unless it be by deed, or there be a good consideration for it.

Promise  
by admin-  
istrator.

**1078.** A promise by an administrator by word of mouth, made before administration is granted may, under certain circumstances be binding upon him afterwards.

**1079.** Forbearance of suit is good consideration <sup>Forbearance of</sup> without assets at the time of the promise. So if an executor be indebted to J. S., in £100, who demands the money, the executor is chargeable only in respect of assets and not otherwise, but if he promises to pay the debt at a future day it becomes his own debt to be satisfied out of his own estate.

*Goring v. Goring*, Yelv. 11.

**1080.** Where an attorney delivered up deeds to an executor, which he was not obliged to do until his bill was paid, and these deeds were of great use to the executor in several suits which were then carrying on, it was held that this was a sufficient consideration to make the executor liable to the attorney's whole demand, whether there were assets or not.

*Hamilton v. Inceledon*, 4 Bro. P. C. 4.

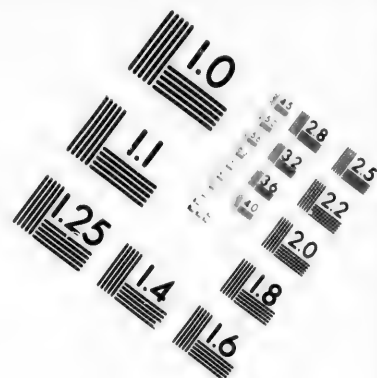
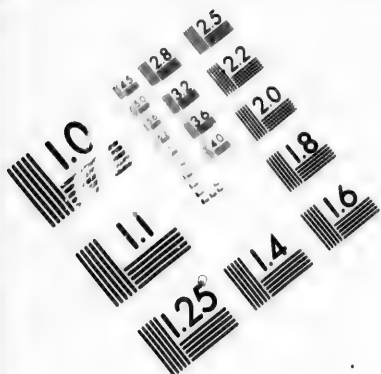
**1081** Having assets is a good consideration for a promise by an executor or an administrator to pay a debt of the deceased, or to answer damages out of the executor's own estate.

**1082.** By the 4th section of the Statute of Frauds, <sup>29 Charles II. c. 3, s. 4.</sup> it is enacted that:

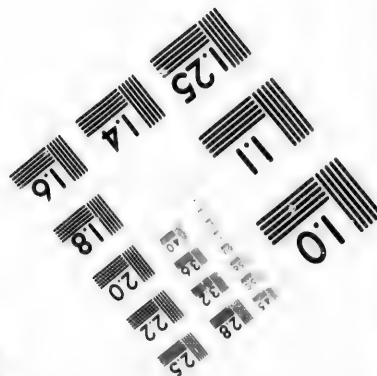
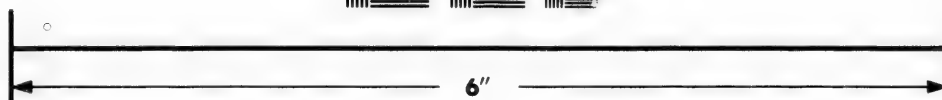
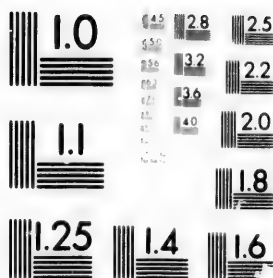
No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damage out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto lawfully authorized.

**1083.** Section 8 of an Act respecting Written Promises and Acknowledgments of Liability (R. S. O. 1897, c. 146), provides:

No special promise made by any person to answer for the debt, default, or miscarriage of another person, being in writing and signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized, shall be deemed another



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need not be invalid to support an action, or other proceeding to charge the person by whom the promise has been made, by reason only that the consideration for the promise does not appear in writing or by necessary inference from a written document.

**1084.** This Act removes the difficulty raised by *Wain v. Warlters*, 5 East, 10, which decided that the consideration of the promise as well as the promise itself should be in writing, otherwise it was void.

Submission to arbitration.

**1085.** Where an executor submits in broad terms by a submission to arbitration to pay whatever shall be awarded, and the arbitrator awards that he shall pay a certain sum, he is personally bound to perform the award, whether he has assets or not. For if an executor or administrator thinks fit to refer generally all matters in dispute to arbitration without protesting against the reference being taken as an admission of assets, it will amount to such an admission.

The Arbitration Act is R. S. O. 1897, c. 62.

Liability for funeral expenses.

**1086.** If an executor or administrator gives orders for the funeral, or ratifies or adopts the acts of another party who has given such orders, he makes himself liable individually, and not in his representative character for the reasonable expenses; and notwithstanding that, generally speaking, an administrator is not bound as such by his acts done before the letters of administration were obtained, yet it would seem that if before taking out letters he gives orders or sanctions the orders which another person has given for the funeral of the deceased, he will be thereby bound after he has become administrator to satisfy the charges incurred under such orders.

*Lucy v. Walrond*, 3 Bing. N. C. 841.

Carrying on of trade of deceased.

**1087.** A trade is not transmissible, but is put an end to by the death of the trader. Executors, therefore, have no authority in law to carry on the trade of their testator, and if they do so, unless under the protection of the

Court of Chancery, they run great risk, even though the will contains a direction that they should continue the business of the deceased. The case of an executor or administrator in this respect is very hard, for if the trade be beneficial the profits are applicable to the purposes of the trust, and the executor or administrator derives no personal benefit from the success; if, on the contrary, the trade proves a losing concern the executor, on failure of assets, will be personally responsible for the debts contracted in the business since the testator's death to the extent of all his own property.

*Vulliamy v. Noble*, 3 Mer. 614.

*Townend v. Townend*, 1 Giff. 201.

**1088.** Where partners covenant that they and their respective executors and administrators will continue partners for a certain term of years, and one of them dies before the term has expired, his executors or administrators cannot be compelled to become partners personally, though the covenant is binding on the estate of the deceased partner in their hands.

*Spence's Case*, 17 Beav. 203.

**1089.** If an executor, without any authority from the will, take upon himself to trade with the assets, the testator's estate will not be liable in case of his bankruptcy. The testator's creditors and legatees will have a right to prove demands for such of the assets as have been wasted by the executor in the trade in proportion to their respective interests.

**1090.** With respect to such of the assets as can be specifically distinguished to be a part of the testator's estate they will not pass to the assignee in insolvency.

**1091.** The testator may by his will limit the power of his executor to carry on the trade, and set aside a specific part of the assets which he may sever from the general mass of his property for that purpose. Then the

rest of the assets will not be affected by an insolvency, although the whole of the executor's private property would be subject to the liability.

*Thompson v. Andrews*, M. & M. 116.

Priority of  
creditors  
and execu-  
tors.

**1092.** A testator's business was carried on by his executors under the provisions of his will and with the assent of his creditors, and was properly carried on. Questions considered: (1) The relative rights of the creditors of the testator and the subsequent trade creditors of the executors against the assets of the testator's estate at the time of his death, and against the assets subsequently acquired for the estate by carrying on the business; (2) the executors's right to indemnity; and (3) the right of the trade creditors to avail themselves of that indemnity:—Held, that the executors were entitled (in priority to the testator's creditors) to be indemnified against the liabilities which they had properly incurred, and that the indemnity was not limited to that portion of the assets which had come into existence or had changed its form since the testator's death.

*Dowse v. Gorton*, C. A. 40 Ch. D. 536 (varied by H. L. (E.) (1891) A. C. 190; *In re Brooke* (1896), 2 Ch. 600.

New capi-  
tal cannot  
be embark-  
ed.

**1093.** A testator's direction to his executors to continue to carry on business with his surviving partners, does not authorize the executors to embark any new capital in the business.

*Smith v. Smith*, 13 Chy. 81.

Indemnity  
to execu-  
tors.

**1094.** Where the trustees and executors of a will carried on the testator's business after his death, and incurred trade debts, and were in default in payment of money—Held, that to deprive them of their indemnity they must be in default in payment and not merely in rendering accounts, and that the trade creditors were entitled to prove against the estate through the right of the trustees to indemnity.

*In re Kidd, Kidd v. Kidd* (1894), W. N. 73.

The assets of a deceased person are not liable for debts incurred by an executor or administrator in continuing the trade or business of the deceased.

*Lovell v. Gibson*, 19 Chy. 280.

Executors carrying on business entitled to an indemnity.

*In re Kidd*, 8 R. 261.

*In re Millard*, 72 L. T. 823.

Continuing business.

*Worts v. Worts*, 18 O. R. 232; *L. & C. v. Wallace*, 8 O. R. 539.

**1095.** When the law speaks of executors not carrying on the business of their testator, it means that they are not to buy and sell. There are many cases when executors not only may but are bound to continue the business to a certain extent.

*Wms. D.* 1689.

**1096.** If a party contracts for himself and his executors to build a house, and dies, the executors must go on or they will be liable in damages for not completing the work.

*Marshall v. Br. dhurat*, 1 Cr. & J. 405.

**1097.** If a bookseller undertakes to publish a work in parts, and before the completion dies, a subscriber has a claim upon the estate to complete the work. So, if a man makes half a wheelbarrow or half a pair of shoes and dies, the executors may complete them, and they are not bound to sacrifice the property of their testator by selling articles in an imperfect state. So, if the deceased die possessed of a manufactory, his executors would be justified in continuing the works for a reasonable time if this should be requisite for the purpose of selling the machinery and premises to advantage, and they will not be charged with any loss sustained in employing of assets, and so continuing the trade, if they act according to their best judgment.

*Collinson v. Lister*, 20 Beav. 356.



## CHAPTER X.

OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR IN RESPECT TO HIS OWN  
TORTIOUS OR NEGLIGENT ACTS.

Devastavit  
defined.

**1098.** A violation or neglect of duty by an executor or administrator which makes him personally responsible, is called in law a devastavit, or a wasting of the assets. It is defined to be a mismanagement of the estate and effects of the deceased in squandering and misapplying the assets contrary to the duties imposed on him, for which an executor or administrator must answer out of his own pocket, as far as he had, or might have had, assets of the deceased.

Liability  
of executor

**1099.** An executor is personally liable for all breaches of the ordinary trusts which by a Court are considered to arise from his office.

*Re Marsden*, 26 C. D. 783.

**1100.** Where personal property is bequeathed to executors, as trustees, taking probate of the will is in itself an acceptance of the particular trusts.

General  
rule as to  
liability.

**1101.** The general rule as to the liability of executors and administrators in this respect is founded on two principles: (1) In order not to deter persons from undertaking this office the Court is extremely liberal in making every possible allowance, and cautious not to hold executors or administrators liable upon slight grounds. (2) Care must be taken to guard against an abuse of their trust.

*Tebbs v. Carpenter*, 1 Madd. 298.

Negli-  
gence.

**1102.** Executors and administrators may be guilty of a devastavit not only by a direct abuse of the effects of

the deceased, as by spending or consuming or converting to their own use, but also by such acts of negligence and wrong administration as will disappoint the claimants on the assets. An example of plain and palpable abuse is the application of the assets to the satisfaction of the executor's own debt to a third party. So, where the executor collusively sells the testator's goods at an under value, when he might have obtained a higher price for them, it is a devastavit, and he shall answer the real value.

Collusive sale.

*Rice v. Gordon*, 11 Beav. 265.

**1103.** Examples of devastavit arising from the maladministration of the executor or administrator are misapplying the assets in undue expenses for the funeral; payment of debts out of their legal order to the prejudice of such as are superior, or by assent to, or payment of a legacy when there is not a fund sufficient for creditors.

Maladministration.

**1104.** If the executor surrenders or otherwise fails to preserve the residue of a term of years where the land is of greater yearly value than the rent, it is a devastavit.

Term of years.

*Thompson v. Thompson*, 9 Price, 476.

**1105.** If the rent be greater than the yearly value of the land, and the testator was the assignee of the term, the executor may be guilty of a devastavit in neglecting to exonerate the estate of the testator from its liabilities in respect of the lease, by assigning it to some other person.

Assignment of term.

*Rowley v. Adams*, 4 M. & Cr. 534.

**1106.** An executor will be guilty of a devastavit if he applies the assets in payment of a claim which he is not bound to satisfy as if he makes disbursements in the schooling, feeding or clothing of the children of the deceased subsequently to his decease.

Maintenance of children.

*Giles v. Dyson*, 1 Stark N. P. C. 32.

Payment  
of debt  
barred by  
statute.

**1107.** An executor may pay a debt proved to be justly due by his testator, although barred by the Statute of Limitations, he is not bound to plead the statute to an action commenced against him by a creditor of the testator.

*Lucia v. Rumney*, L. R. 4 Eq. 451.

Must use  
due dili-  
gence.

**1108.** Such acts of negligence or careless administration as defeat the rights of creditors or legatees, or parties entitled in distribution, will amount to a devastavit; for, if persons accept the trust of executors, they must perform it. They must use due diligence and not suffer the estate to be injured by their neglect.

Delay in  
payment  
of debt.

**1109.** So, if an executor delays the payment of a debt payable on demand with interest and suffers judgment for the principal and interest incurred after the testator's death, this is a devastavit, for the interest, unless the executor can show that the assets were insufficient to discharge the debt immediately, and where the executor permits debts carrying interest to run on, when he had in his hands a fund to pay them, he shall be charged with interest at that rate.

*Bate v. Robins*, 32 Beav. 73.

Delay in  
commenc-  
ing action

**1110.** Again, if the executor by his delay in commencing an action, has enabled the debtor of his testator to protect himself under a plea of the Statute of Limitations, this amounts to a devastavit.

*East v. East*, 5 Hare, 348.

Money on  
bond.

**1111.** Where, for more than three years, executors permitted money to remain due on bond to their testator, without enquiring into the circumstances and situation of the obligor, or calling upon him to pay in the money, the executors, on the obligors becoming bankrupt, were held responsible.

*Attorney-General v. Higham*, 2 Y. & Coll. Ch. C. 634.

**1112.** If any goods of the testator are stolen from the possession of an executor, or from the possession of a third person to whose custody they have been delivered by the executor, or are lost by casualty, as by accidental fire, the executor is not charged with these as assets.

*Jones v. Lewis*, 2 Ves. Sen. 240.

**1113.** Where an executor puts out the money of his testator, upon a real security, which there is no reason then to suspect, but afterwards such security proves bad, the executor is not accountable for the loss any more than he would have been entitled to the profits had it continued good.

*Ingle v. Partridge*, 34 Beav. 41.

**1114.** An executor or administrator lending money of the deceased upon bond, promissory note or other personal security is guilty of a breach of trust, and is personally answerable if the security proves defective, even though a will gives the executors power to lend on personal property, it does not enable them, even as against legatees, to accommodate a trader with a loan on his bond.

*Lovry v. Fulton*, 9 Sim. 115.

**1115.** Where a testator empowers his executors to lend money on personal security, he must be taken to rely upon the united vigilance of them all with respect to the solvency of the borrowers. If one of them lends to the other this object is defeated, consequently such a loan is a breach of trust, and a misappropriation of the fund, and if any mischief arises to the estate of the testator the executors will be liable.

*Warwick v. Richardson*, 10 M. & W. 284.

**1116.** An executor is not justified in unnecessarily keeping his testator's money dead in his hands, and, therefore, if the exigencies of his office do not require otherwise, the executor should invest the unemployed money in such securities as are allowed by the statute.

Unauthor-  
ized secur-  
ities.

**1117.** If an executor lays out his testator's money in unauthorized securities, and there is any shrinkage in value, the loss will be thrown on him, although there be no mala fides on his part. On the other hand, if any profit happen by the rise of the stock in which the executor has laid out the money he shall not have the benefit, but it shall accrue to the estate of his testator.

*Phayre v. Perce*, 3 Dow. 128.

Insufficient  
securities.

**1118.** Where trustees are bound to invest money in public funds, and instead of doing so retain the money in their hands, or invest it upon insufficient security, the cestuis qui trustent may elect to charge them either with the amount of the money or with the amount of the stock which they might have purchased with the money.

*Pride v. Fooks*, 2 Beav. 430.

Discretion  
to invest.

**1119.** Where they are not bound to invest money in authorized stock, or in any specific security, but by the terms of the trust have a discretion to invest it in various ways, they are chargeable with the whole amount of the trust fund together with the interest.

*Robinson v. Robinson*, 1 De G. M. & G. 247.

**1120.** Executors ought not, without great reason, to permit money to remain upon personal security longer than is absolutely necessary.

Neglect to  
realize.

**1121.** Where executors have neglected to realize assets which are outstanding on an improper investment, there is no fixed period at which the loss is to be calculated, it depends upon the particular nature of the property and the evidence affecting it.

*Marsden v. Kemp*, 5 C. D. 598.

**1122.** It is not the duty of the executor to call in money invested on real security where no risk is apparent.

Investment—i etc.

*Re Gabourie, Casey v. Gabourie*, 13 O. R. 635.

**1123.** The present rules as to authorized investments are contained in The Trustee Investment Act (R. S. O. 1897, c. 130), as amended by Ontario Statutes, 1899, c. 11, s. 32, and 1900, c. 18, s. 1.

Rules as to authorized investments.

2. (1) Trustees or executors having trust money in their hands, which it is in their duty, or which it is in their discretion, to invest at interest, shall be at liberty at their discretion, to invest the same in any stock, debentures or securities of the Government of the Dominion of Canada, or of this Province, or of any of the other Provinces of Canada; or in debentures or securities, the payment of which is guaranteed by the Government of the Dominion of Canada, or of this Province, or of any of the other Provinces of Canada; or in the debentures of any municipality in this Province; or in securities which are a first charge on land held in fee simple, provided that such investments are in other respects reasonable and proper, and such trustees or executors shall also be at liberty, at their discretion to call in any trust funds invested in any other securities than as aforesaid, and to invest the same in any such stock, debentures or securities aforesaid, and also, from time to time, at their discretion, to vary any such investments as aforesaid, for others of the same nature; and any such moneys already invested in any such stock, debentures or securities as aforesaid, shall be held and taken to have been lawfully and properly invested.

Trustee or executor may invest the money in certain securities. Imp. Act 23, 24 V. c. 145, s. 25

(2) This section shall apply and extend to both present and future trustees and executors. R. S. O. 1887, c. 110, s. 29 (1 and 2).

This section to apply to all trustees, etc. Interpretation.

3. (1) For the purpose of the following sections of this Act the expression "trustee" shall be deemed to include an executor or administrator, and a trustee whose trust arises by construction or implication of law as well as an express trustee.

(2) The provisions of this Act relating to a trustee shall apply as well to several joint trustees as to a sole trustee.

(3) The expression "stock" shall include fully paid up shares.

(4) The expression "instrument" shall include an Act of the Legislature of Ontario. Ont. Acts, 1891, c. 19, s. 2.

4. The powers hereby conferred are in addition to the powers conferred by the instrument, if any, creating the trust; provided that nothing herein contained shall authorize any trustee to do anything

Additional powers given.

which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust. R. S. O. 1887, c. 110, s. 29 (2); Ont. Acts, 1891, c. 19, s. 3.

Proviso.

5. (1) It shall be lawful for a trustee, unless expressly forbidden by the instrument (if any) creating the trust, to invest any trust funds in his hands in terminable debentures or debenture stock of the hereinafter mentioned societies and companies, provided that such investment is in other respects reasonable and proper, and that

Investment of trust funds.

the debentures are registered, and are transferable only on the books of the society or company in his name as the trustee for the particular trust estate for which they are held in such debentures or debenture stock as aforesaid.

(a) Of any incorporated society or company which has been, or shall hereafter be authorized by any lawful authority to lend money upon mortgages on real estate, or for that purpose and other purposes, such society or company having a capitalized, fixed, paid up and permanent stock, not liable to be withdrawn therefrom, amounting to at least \$500,000, and having a reserve fund amounting to not less than 25 per cent. of its paid-up capital, and its stock having a market value of not less than 25 per cent. premium.

(b) Of any society or company heretofore incorporated under chapter 164 of the Revised Statutes of Ontario, 1877, or any Act incorporated therewith, or under chapter 169 of the Revised Statutes of Ontario, 1887, having a capitalized, fixed, paid up and permanent stock not liable to be withdrawn therefrom amounting to at least \$100,000, and having a reserve fund amounting to not less than 15 per cent. of its paid up capital, and its stock having a market value of not less than 7 per cent. premium, provided that nothing in this clause (b) shall in any way affect any investment made under statutory authority before the passing of this Act.

(2) The trustees may from time to time vary any such investments. Ont. Acts, 1891, c. 19, s. 4 (1-c).

Companies in which funds invested to be approved of by Lieutenant Governor.

6. No investments shall be made under authority of this Act in the debentures of any society or company of the class first hereinbefore mentioned which has not obtained an order of the Lieutenant-Governor in Council approving of investments in the debentures thereof; and such approval is not to be granted to any society or company which does not appear to have kept strictly within its legal powers in relation to borrowing and investment. Ont. Acts, 1891, c. 19, s. 5.

Revocation of Order in Council approving of investment.

7. The Lieutenant-Governor in Council if he deems it expedient may at any time revoke any Order in Council previously made approving of investments in the debentures or debenture stock of any Society or company. Such revocation shall not affect the propriety of investments made before such revocation. Ont. Acts, 1891, c. 19, s. 6.

When trustee not chargeable for lending on insufficient security. Imp. Act, 51-52 Vict. c. 59, s. 1.

8. (1) No trustee lending money upon the security of any property shall be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the Court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom the trustee reasonably believed to be an able, practical, surveyor or valuer, instructed and employed independently of any owner of the property, whether surveyor or valuer, carried on business in

the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed one-half of the value of the property as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report. This section shall apply to a loan upon any property on which the trustee can lawfully lend.

(2) This section shall apply to transfers of existing securities as well as to new securities, and to investments made as well before as on and after the 4th day of May, 1891, unless some action or other proceeding was pending with reference thereto at the said date. Ont. Acts, c. 19, s. 9.

9. (1) Where a trustee has improperly advanced trust money on a mortgage security which would at the time of the investment have been a proper investment in all respects for a less sum than was actually advanced thereon, the security shall be deemed an authorized investment for such less sum, and the trustees shall only be liable to make good the sum advanced in excess thereof with interest.

Trustee lending more than authorized amount. Imp. Act. 51, 52 Vict. c. 59, s. 5

(2) This section shall apply to investments made as well before as on and after the 4th day of May, 1891, unless some action or other proceeding was pending with reference thereto at the said date. Ont. Acts, 1891, c. 19, s. 10.

**1124.** Section 2 of Ontario Statute, 1900, chapter 18, reads as follows:—

Liability in case of change of character

No executor, administrator or trustee, shall be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorized by the instrument of trust or by the general law; and these provisions shall apply to cases arising either before or after the passing of this Act.

Imp. Act 57 V. c. 10

**1125.** If an executor appoints another to receive the money of his testator, and he receives it, it is the same thing as if the executor himself had actually received it, and will be assets in his hands. But with respect to losses sustained by the failure of bankers, or other persons into whose hands the money of the testator has been deposited by the executor, where the money was made from necessity or conformably to the common usage of mankind, the executor will not be responsible for the loss.

Agent for executor.

Failure of bankers.

*Fenwick v. Clarke*, 31 L. J. Ch. 728.



Auctioneer.

**1126.** Where executors employ an auctioneer to sell any portion of the assets, and he receives the deposit and fails to pay it over, the executors will not, generally speaking, be held personally liable for the loss.

*Edmonds v. Peake*, 7 Beav. 239.

**1127.** The former law has been relaxed somewhat, by the following provisions of The Trustee Act (R. S. O. 1897, c. 129).

Interpretation as to next five sections. "Trustee."

27. (1) For the purposes of the next five sections of this Act the expression "trustee" shall be deemed to include an executor or administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee.

Extended to joint trustees. "Instrument."

(2) The provisions of the said five sections relating to a trustee shall apply as well to several joint trustees as to a sole trustee.

(3) The expression "instrument" shall include an Act of the Legislature of Ontario. R. S. O. 1897, c. 129, s. 27 (1, 2, 3). Ont. Acts, 1891, c. 19, s. 2 (1, 2, 4).

Apply to all trusts.

(4) The said five sections shall apply as well to trusts created by an instrument executed before as to trusts created on or after the 4th day of May, 1891, and the powers by the said sections conferred are in addition to the powers conferred by the instrument, if any, creating the trust. Provided always that save as in the said sections expressly provided, nothing therein contained shall authorize any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do by the instrument creating the trust. R. S. O. 1897, c. 129, s. 27 (4). Ont. Acts, 1891, c. 19, ss. 3, 14.

Proviso.

Appointment of agents by trustees for certain purposes. Imp. Act 51, 52 V. c. 59, s. 2.

28. (1) It shall be lawful for a trustee to appoint a solicitor to be his agent to receive and give a discharge for any money or any valuable consideration of property receivable by such trustee under the trust; and no trustee shall be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; provided that nothing herein contained shall exempt a trustee from any liability which he would have incurred if this section had not been enacted in case of permitting such money, valuable consideration, or property to remain in the hands or under the control of the solicitor for a period longer than is reasonably necessary to enable the solicitor to pay or transfer the same to the trustee.

Proviso.

(2) It shall be lawful for a trustee to appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to such trustee under or by virtue of a policy of assurance or otherwise; and no trustee shall be chargeable with a breach of trust by reason only of his having made or concurred in making

any such appointment; provided that nothing herein contained shall exempt a trustee from any liability which he would have incurred if this section had not been enacted, in case he permits such money to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable him to pay the same to the trustee.

(3) This section shall apply only where the money or valuable consideration or property was or is received on or after the 4th day of May, 1891. R. S. O. 1897, c. 129, s. 28. Ont. Acts, 1891, c. 19, s. 7.

Administrator acting by agent.

*O'Sullivan v. Hartly*, 10 A. R. 76.

**1128.** A devastavit by one of two executors or administrators shall not charge his companion, provided he has not intentionally, or otherwise, contributed to it for the testator having misplaced his confidence in one shall not operate to the prejudice of the other. Therefore, an executor is not, under ordinary circumstances, responsible for the assets come to the hands of his co-executor. But where an executor possessing assets of his testator, hands over these assets to a co-executor, and they are misapplied by that co-executor, then the executor who hands them over shall be answerable for their misapplication, unless he can show a good reason for having so acted. But if an executor is merely passive by not obstructing his co-executor from getting the assets into his possession, the former is not responsible, if the one in any way contributes to enable the other to obtain possession; he is answerable, notwithstanding his motive be innocent, unless he can assign a sufficient excuse. Thus, if by agreement among several executors, one is to receive and intermeddle with such part of the estate and another with such a part, each of them will be chargeable for the whole, because the receipts of each are pursuant with the agreement made between them. Therefore, an executor having a fund standing in the joint names of himself and another cannot, upon the mere representation of the co-executor, if false, be justified in doing an act that is an exercise of power over that fund. First, the act must be necessary for the pur-

Responsibility for acts of co-executor.

poses of the will, and then the person, to whom the representation is made, has imposed upon him at least ordinary and reasonable diligence to enquire whether the representation is true.

*Broadhurst v. Balguy*, 1 Y. & C. 16.

Co-executor a banker.

**1129.** If one executor places the property of the testator in the hands of the other, who happens to a banker, or in such a situation that the act is not imprudent, the executor so depositing shall not be charged in case of a loss, for if he had been a sole executor, and under the same circumstances placed the money in the banker's hands, he would not have been liable.

Effect of taking probate.

**1130.** One executor is not answerable for the receipt of the other, merely by taking probate, permitting the other to possess the assets, and joining in acts necessary to enable him to administer.

*Styles v. Guy*, 1 Mac. & G., 422.

Passive acquiescence.

**1131.** It is the duty of all executors to watch over, and if necessary, to correct the conduct of each other, and an executor, as well as a trustee, who stands by and sees a breach of trust committed by his co-trustee becomes responsible for that breach of trust.

See *Archer v. Severn*, 13 O. R. 316.

**1132.** In cases of the description above considered, a trustee or executor will not be protected by the usual indemnity clause, exonerating him from all responsibility on account of the acts of his co-trustees or co-executors.

*Wilkins v. Hogg*, 3 Giff. 116.

Effect of indemnity clause.

H. & C. were appointed executors. H. took upon himself the actual management of the estate, with the knowledge and consent of, but not under any express agreement with C. H. applied a sum of money to his own use, but of this C. was not aware. The will contained the usual indemnity clause exonerating each from liability for the other: Held, that C. was not liable for the sum appropriated by H.

*King v. Hilton*, 20 Chy. 381.

An executor who does an act by which his co-executor obtains "Unnecessary" act. sole possession of assets of the testator, is only liable for misapplication by his co-executor, if the act was "unnecessary." Such an act is not unnecessary if done in the regular course of business. A. made his wife B., J., and C., his executors. A. was the registered holder of certain American railway shares; these shares could either be sold as registered shares or be unregistered, and then sold as shares to bearer; the latter was the ordinary course of business. J. requested B. and C. to unregister the shares. This was done. J. misappropriated part of the proceeds, and absconded within eleven months of A.'s death: Held (1), that unregistering the bonds and handing them to J. to sell were not "unnecessary" acts, and that B. and C. were not liable for J.'s misappropriation; (2) that as J. was trusted by A., and as B. and C. had no reason to suspect him, there had been no such delay in calling upon J. for an account as to make B. and C. liable.

*In re Gasquoine, Gasquoine v. Gasquoine* (1894), 1 Ch. 470.

One executor may, without the concurrence of his co-executor, validly sell or pledge assets of the estate to a purchaser or mortgagee in good faith, and the purchaser or mortgagee is not put upon enquiry or affected with notice of breach of trust because the executor is described in the transfer or mortgage as "trustee."

*Cumming v. Landed Credit Co.*, 22 S. C. 246.

**1133.** If an executor administers part of the assets, he shall be charged with such as he has received, although he has renounced the executorship, and paid the money to a co-executor who proved the will. For executors must either wholly renounce, or if they act to a certain extent as executors and take upon them that character, they can be discharged only by administering the assets themselves or administering the estate through the Court. But an executor who has not proved is not to be considered as acting by assisting a co-executor, who has proved, in writing letters to collect debts or by writing directly to a debtor of the testator requiring payment.

Administration of part of assets.

**1134.** So if one of two persons named executors disclaims and renounces, who afterwards possesses himself of assets, as agent to the other, who has proved the will,

Disclaiming executor as agent

the former does not thereby become accountable as executor.

*Lowry v. Fulton*, 9 Sim. 104.

Effect of  
proving  
will.

**1135.** Where an executor has once proved the will, he cannot renounce his representative character and act under another. He can do no act in regard to the estate for which he is not answerable as executor.

Receipt  
by execu-  
tor or  
trustee.

**1136.** Where executors join in a receipt, both having the whole power for the whole fund, both are chargeable.

**1137.** Where trustees join, each not having the whole power joining being necessary, only the person receiving the money is chargeable.

*Gregory v. Gregory*, 2 Y. & C. 315.

Effect of  
concurrence  
or acquies-  
cence.

**1138.** Although concurrence in the act of devastation on the part of the parties injured by it, or acquiescence without original concurrence will release the executors, yet the Court must inquire into all the circumstances which induced the concurrence or acquiescence, and ascertain whether their conduct really amounts to such a previous sanction or subsequent ratification as ought to relieve the executors from responsibility.

*Davies v. Hodgson*, 25 Beav. 177.

Profits.

**1139.** An executor must account for all profits which have accrued in his own time, either spontaneously or by his acts, out of the estate of the deceased.

*Sugden v. Crossland*, 3 Sm. & G. 192.

Executor  
cannot be  
purchaser.

**1140.** An executor cannot be allowed, either immediately or by means of a trustee, to be a purchaser of any part of the assets, but shall be considered a trustee for the persons interested in the estate, and shall account for the utmost extent of advantage made by him of the subject so purchased.

*Smedley v. Vasey*, 23 Beav. 358.

**1141.** If an executor compounds debts or mortgages, and buys them in for less than is due upon them, he shall not take the benefit of it himself; but other creditors and legatees shall have the advantage of it, and for want of them the benefit shall go to the party who is entitled to the surplus.

Executor compounds claims.

*Barton v. Hossard*, 3 Dr. & Sm. 461.

**1142.** If an executor lays out the assets on private securities, although he shall answer for all deficiencies which may be caused thereby, he must account to the estate for all benefit.

Private securities.

*Adje v. Feuilleau*, 1 Cox, 24.

**1143.** An executor, if he takes upon himself to act with regard to the testator's property in any other manner than his trust requires, puts himself in this situation, that if there be any loss he must replace it; but he cannot possibly be a gainer by it, any gain must be for the benefit of his *certain que* trust.

Executor acting contrary to trust.

*Crosskill v. Bourc*, 32 Beav. 86.

**1144.** There are two grounds on which an executor or administrator may be charged with interest:

When interest may be charged

1. That he has been guilty of negligence in omitting to lay out the money for the benefit of the estate.

2. That he himself had made use of the money, or had committed some other misfeasance to his own profit and advantage.

**1145.** It may frequently be necessary and justifiable for an executor to keep large sums in his hands to answer the exigency of the testator's affairs, especially in the course of the first year after the decease of the testator, in which case the fund is not considered distributable until after that time; but if an executor keeps money dead in his hands without any apparent reason or necessity, then it becomes negligence and a breach of trust and the Court will charge the executor with interest.

Keeping money in hand.

*Davenport v. Stafford*, 14 Beav. 319.

**1146.** Where an executor alleged that he had kept money belonging to the estate for several years in his house, until the same was destroyed by fire and the money lost, the court held the executor guilty of a breach of trust, and his affidavit as to the destruction being unsatisfactory, refused to discharge him from custody under a writ of arrest.

*Lawson v. Crookshank*, 2 Chy. Chamb. 426.

Money retained or paid under mistake.

**1147.** An executor is not to be charged with interest for a balance in his hands retained under a false apprehension of his right, nor for money paid away under a mistake as to the legal right of it.

*Gallivan v. Evans*, 1 Ball. & B. 191.

Executor using estate funds.

**1148.** If an executor makes use of estate money he ought to pay the interest he made. If the fund is employed in trade the cestuis que trustent have a right to an option of taking either the interest or the profits which have arisen from the trade. But they must take either the profits for the whole period, or the interest for the whole period.

*Heathcote v. Hulme*, 1 J. & W. 122.

Executor mixing trust funds with private moneys.

**1149.** If an executor or other trustee mixes trust funds with the private moneys, and employs them both in a trade or adventure of his own, the cestui que trust may, if he prefers it, insist upon having a proportionate share of the profits instead of interest on the amount of the trust funds so employed.

*Portlock v. Gardner*, 1 Hare, 594.

Taking account with rests

**1150.** Taking an account with rests, means that under it the interest computed on the balance due at the end of the first year is to form part of the balance due at the end of the second year, and upon which interest is then to be computed, and so on from year to year to the end of the account.

**1151.** It is not usual to allow interest on claims where there is no fraud, or wilful withholding of accounts, only a loose mode of dealing between the parties. The discretion under which a jury may allow interest applies to the master's office.

*Re Kirkpatrick*, 10 P. R. 4.

**1152.** The English rules regulating the award of interest against executors and trustees may be approximated in this province, (1) by charging an executor who negligently retains funds which he should have paid over or made productive for the estate, at the statutory rate of six per cent.; (2) by charging him who has broken his trust by using the money for his own purposes (though not in trade or speculation) at such a rate of interest as is the then current value of money; and (3) by charging him who makes gain out of his trust by embarking the money in speculative or trading adventures with the profits or with compound interest, as the case may be. The executors in this case kept considerable and constantly increasing balances in their hands from year to year, and allowed the acting executor to use the money as he pleased. It was not proved that any profit was made out of it, and no special evidence was given to shew what the current rate of interest during that period was; but the notes and mortgages held by the executors bore interest for the most part at six per cent. The master charged the executors with interest at six per cent. per annum, with annual rests upon moneys in their hands belonging to the estate, and allowed them the usual commission and costs. On an appeal from the report of the master, it was :—Held, that the interest should be charged at six per cent.; but that the awarding of compound interest was opposed to the spirit of the decision in *Inglis v. Beaty*, 2 A. R. 453, and could be only upheld as being in the nature of a penalty imposed on the executors.

*Re Honsberger*, 10 O. R. 521.



Discretion as to investments.

**1153.** Where moneys are left by will to be invested at the discretion of the executor or trustee, the discretion so given cannot be exercised otherwise than according to law, and does not warrant an investment in personal securities or securities not sanctioned by the court:—Held, that an executor and trustee who deposited funds so left in trust for infants, at three-and-a-half or four per cent. interest, in a savings' bank, did not conform to his duty; and his failure to do so exposed him to pay the legal rate of interest for the money, although he acted innocently and honestly; and the acquiescence of the statutory guardian of the infants, not being for their benefit, did not relieve him:—Held, also, that the defendant was not entitled to costs out of the fund, but that he should be relieved from paying costs.

*Spratt v. Wilson*, 19 O. R. 28.

Allowance for reasonable expenses.

**1154.** An executor or administrator is entitled to be allowed all reasonable expenses which have been incurred in the conduct of his office, except those which arise from his own default. It is a general principle that an executor or administrator shall have no allowance at law or in equity for personal trouble and loss of time in the execution of his duties; nor is the case altered by the executors's renunciation of the executorship and his afterwards assisting in it; nor although it should appear that he has deserved more, and has benefited the estate to the prejudice of his own affairs.

*Robinson v. Pett*, 3 P. Wms. 249.

Surviving partner.

**1155.** A surviving partner, being an executor, is not entitled, without expressed stipulation, to have allowance for carrying on the trade after the testator's death.

Solicitor trustee.

**1156.** A trustee, who is a solicitor, is entitled to be repaid such costs, charges and expenses only as he has properly paid out of his pocket, and where an executor and trustee employs his co-trustee, who is a solicitor, to

transact the legal business of the trust, the solicitor is only entitled to costs out of pocket.

**1157.** An agent, who is appointed an executor of his principal, is not entitled to charge commission on business done subsequently to the testator's death. Agent executor.

**1158.** An executor, who acts as auctioneer in the sale of assets, is not entitled to charge commission. Executor auctioneer.

**1159.** Compensation to executors and administrators is now awarded under the authority of sections 40 to 43 of The Trustee Act (R. S. O. 1897, c. 129), which are as follows: Compensation.

40. Any trustee under a deed, settlement or will; any executor or administrator; any guardian appointed by any Court, and any testamentary guardian, or any other trustee, howsoever the trust is created, shall be entitled to such fair and reasonable allowance for his care, pains and trouble, and his time expended in and about the trust estate as may be allowed by the High Court or Judge, or by any Master or Referee thereof to whom the matter may be referred. R. S. O. 1897, c. 129, s. 40 (s. 38, R. S. O. 1887, c. 110). Allowance to trustee.

41. A Judge of the High Court may, on application to him for the purpose, settle the amount of such compensation, although the trust estate is not before the Court in any action. R. S. O. 1897, c. 129, s. 41 (s. 39, R. S. O. 1887, c. 110). Allowance to be made although the estate not before the Court.

42. Compensation may be allowed in the case of any trust heretofore created, as well as in any to be hereafter created. R. S. O. 1897, c. 129, s. 42 (s. 40, R. S. O. 1887, c. 110). Act to apply to existing as well as future trusts.

43. The Judge of any Surrogate Court may allow to the executor or trustee, or administrator acting under a will or letters of administration, a fair and reasonable allowance for his care, pains and trouble, and his time expended in or about the executorship, trusteeship, or administration of the estate and effects vested in him under the will or letters of administration, and in administering, disposing of, and arranging and settling the same and generally arranging and settling the affairs of the estate, and may make an order or orders from time to time therefor, and the same shall be allowed to an executor, trustee, or administrator in passing his accounts. R. S. O. 1897, c. 129, s. 43 (s. 41, R. S. O. 1887, c. 110). Surrogate Judge may order an allowance to be made to executor or administrator out of the estate for his trouble.

44. Nothing in the next preceding four sections shall apply to any case in which the allowance is fixed by the instrument creating the trust. R. S. O. 1897, c. 129, s. 44 (s. 42, R. S. O. 1887, c. 110). Where allowance fixed by an instrument.

No inflexible standard.

**1160.** The right of an executor to compensation depends entirely upon the above Act, and as that statute has fixed no standard, each case is to be dealt with on its own merits, according to the discretion of the judge. The courts have laid down no inflexible rule in this regard, and the adoption of any hard and fast commission (such as five per cent.) would defeat the intention of the statute.

*Re Fleming*, 11 P. R. 426.

Gratuitous services.

**1161.** In no case will an executor be entitled to allowance for services performed by an agent, and which were so performed by him gratuitously.

*Chisholm v. Barnard*, 10 Chv. 479.

Compensation.

*Boys' Home v. Lewis*, 4 O. R. 18.

*Williams v. Roy*, 9 O. R. 534.

*Denison v. Denison*, 17 Gr. 306, doubted.

*Stewart v. Leys*, 1 O. R. 375. \*

*Archer v. Severn*, 13 O. R. 316.

*Taylor v. Magrath*, 10 O. R. 669.

*Hoover v. Wilson*, 24 A. R. 624.

Surrogate Judge.

**1162.** Where a suit for the administration of an estate is pending, it is improper for the surrogate Judge to interfere by ordering the allowance of a commission to trustees or executors.

*Cameron v. Bethune*, 15 Chv. 486.

Employment of agent.

**1163.** An executor who has proved the will, or a person taking out letters of administration, cannot retire from his duty, but must collect the estate himself; but an executor is justified in having recourse to an agent to collect the assets in cases where a provident owner might well employ a collector, and the executor will therefore be allowed the expense so incurred in his account.

Solicitor's costs.

**1164.** If an executor pays a solicitor for his trouble and attendance in the transacting and conduct of the testator's affairs, he ought to be allowed and

repaid what he pays. But an executor is not entitled to be allowed, without question, the amount of the bill of costs which he has paid. The officer of the Court without regularly taxing the bill will moderate the amount.

*Johnson v. Telford*, 3 Russ. Ch. Cas. 477.

**1165.** Where a solicitor is appointed executor and is at liberty to charge for his professional services, he is only entitled to charge for services strictly professional, and not for matters which an executor ought to do without the intervention of a solicitor, such as for attendances to pay premiums on policies, attending at the bank to make transfers, attendances on auctioneers, legatees and creditors.

Solicitor  
executor.

*Harbin v. Darby*, 28 Beav. 325.

**1166.** If an executor borrows money or advances it out of his own pocket to pay the debts of his testator which carry interest, or satisfy some of his testator's creditors who are very importunate and threaten to bring actions, he is entitled, not only to be paid in full in priority to creditors, but also to an allowance of interest for the money so advanced and borrowed.

Advances  
by ex-  
ecutor.

*Small v. Wing*, 5 Bro. P. C. 72.

**1167.** The following cases will prove useful as an indication of the leaning of the courts where the proceedings are taken against executors.

Executors may be deprived of their costs where they have improperly managed the affairs of the estate, though not guilty of any wilful misconduct; and this rule was acted on where the personal representative of one of the executors was a party to the suit, though he had not acted in the management of the estate; his testator's estate being ample.

*Kennedy v. Pingle*, 27 Chy. 305.

Where an executor by his misconduct in the management of the estate, causes a suit, and but for the fact of the suit having been brought the assets would have been dissipated, the court will not as a general rule allow such executor his costs out of the estate, although no loss has been sustained; and where in such case, the party interested filed a bill without calling upon the executor for an account or affording him any

opportunity of shewing that his dealings were correct, the court refused the costs of the suit to either party up to the taking of the accounts, but directed as the executor to pay the subsequent costs.

*Simpson v. Horne*, 28 Chy. 1.

In a suit for administration it appeared that the personal representative had kept very imperfect accounts of the estate, and that those brought into the master's office had been made up partly from scattered entries and partly from memory—Held, a sufficient justification for the institution of the suit, and that the plaintiff was entitled to the costs from the defendant up to the hearing, although no loss had occurred to the estate.

It was shewn that the personal representative had invested the moneys of the estate in land out of the jurisdiction of the court as well as on personal security, but no loss had been sustained, all having been repaid by the borrowers—Held, that these facts did not constitute any ground for depriving her of the costs of suit subsequent to the decree.

*Killins v. Killins*, 29 Chy. 472.

Held, that the executors in this case were entitled to their costs, because the action was not occasioned by their misconduct; but they were disallowed the costs of such part of the enquiry as was caused by the misapplication of the funds or their failure to make reasonably accurate entries of their dealings with the estate.

*In re Honsberger—Honsberger v. Kratz*, 10 O. R. 521.

A trustee or executor stands in the same position as any other litigant with respect to costs.

*Smith v. Williamson*, 13 P. R. 126.

See also *Sanson v. Clyde*, 31 O. R. 579. Where the executors were deprived of costs for unnecessarily registering a Renewal of Caution under the Devolution of Estates Act.

## PART IV.

### CHAPTER I.

#### REMEDIES FOR EXECUTORS AND ADMINISTRATORS.

##### (1) EXECUTORS AS TRUSTEES.

**1168.** It will have been noticed in the preceding <sup>Executor</sup> pages that many statements have been made and <sup>as trustee</sup> statutes quoted affecting trustees. How far the position of an executor is that of a trustee may be gathered from the following authorities:

After all the debts of an estate are paid, and after the lapse of years from the testator's death, there is a sufficient presumption that one of the several executors and trustees dealing with assets is so dealing *qua* trustee and not as executor, to shift the burden of proof.

*Cumming v. Landed Credit Co.*, 22 S. C. R. 246.

Where the same persons are executors and trustees under a will, they do not lose their powers as such executors and become mere trustees, when all the testator's known debts are paid, or by mere lapse of time.

*Ewart v. Gordon*, 13 Ch. 40.

*Cameron v. Campbell*, 7 A. R. 361.

*Huggins v. Law*, 14 A. R. at p. 401.

Exercise of quasi-judicial functions (valuing).

*Kerr v. Kerr*, 8 O. R. 484.

**1169.** The position of trustee will be hereafter not <sup>Position</sup> so dangerous if the statutes hereunder quoted are <sup>of trustee</sup> liberally applied. The elements of honesty, reasonableness and good faith will be absolutely required in order to invoke their protection.

**1170.** Section 30 of the Trustee Act is as follows:

Trustee committing breach of trust at instigation of beneficiary.  
Imp. Act 51, 52 V. c. 59, s. 6.

30. (1) Where a trustee has committed a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the Court may, if it thinks fit, and notwithstanding that the beneficiary is a married woman entitled for her separate use, whether with or without a restraint upon anticipation, make such order as to the Court seems just for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him.

(2) This section shall apply to breaches of trust committed as well before as after the 4th day of May, 1891, except where an action or other proceeding was then pending with reference thereto. R. S. O. 1897, c. 129, s. 30. Ont. Acts, 1891, c. 19, s. 11.

**1171.** Ont. Acts, 1899, chapter 15, is as follows:

Relief of trustees committing technical breach of trust.  
Imp. Act 59, 60 V. c. 35, s. 3.

1. If in any proceeding affecting trustees or trust property it appears to the Court that a trustee, whether appointed by the Court, or by an instrument in writing, or otherwise, or that any person who in law may be held to be fiduciarily responsible as a trustee, is or may be personally liable for any breach of trust whether the transaction alleged or found to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the Court may relieve the trustee either wholly or partly from personal liability for the same.

Rev. Stat. c. 129, s. 33, application of.

2. Section 33 of "The Trustee Act" shall extend to and include administrators upon intestacy, and with will annexed, and whether already appointed or hereafter to be appointed.

Payment into Court by person holding trust money for trustee.

3. (1) Any persons with whom trust moneys have been deposited or to whose hands trust moneys have come, may, in case the trustee has been absent from the Province for a period of a year, and is not likely to return at an early date, or in the event of the trustee's death, pay the same into the High Court under and in conformity with the provisions of law for the relief of trustees.

(2) This section shall extend to a case where there are more trustees than one, and the trustee or trustees in the Province cannot give an acquittance of the money.

**(2) PETITIONS FOR ADVICE.**

**1172.** Trustees have a further privilege that they are at liberty to apply to the Court for advice under the following statutory authority:

39. (1) Any trustee, executor or administrator, shall be at liberty, without the institution of an action, to apply in Court or in Chambers in the manner prescribed by Rules of Court, for the opinion, advice or direction of a Judge of the High Court on any question respecting the management or administration of the trust property or the assets of a testator or intestate.

(2) The trustee, executor or administrator, acting upon the opinion, advice or direction given by the Judge, shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor or administrator, in the subject matter of the said application; but this provision shall not extend to indemnify a trustee, executor or administrator in respect of any act done in accordance with such opinion, advice or direction as aforesaid, if the trustee, executor or administrator has been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice or direction. R. S. O. 1897, c. 129, s. 39; (s. 37, R. S. O. 1887, c. 110).

**1173.** The Courts have limited their action under this section very much. The following statement appears to indicate how far an applicant may expect assistance:—

In *Re Lorenz' Settlement*, 1 Dr. & Sm. 401, Vice-Chancellor Kindersley said, "My understanding of that section of the Act is, that it was intended by the Legislature that the Court should have the power to advise a trustee or executor as to the management and administration of the trust property in the manner which will be most for the advantage of the parties beneficially interested, and not to decide any question affecting the rights of those parties inter se, otherwise the effect would be that a deed or will involving the most difficult questions, and relating to property to an amount however large, might be construed, and most important rights of parties decided by a single Judge, without any power of appeal whatever. This, I am satisfied the Legislature never intended—It is true, that in some cases the Court has (unadvisedly, as I think), upon a petition under this section, given its opinion on questions affecting the rights of parties. But I believe that the Judges generally now consider that it ought not to be done."

As the advice, if given, is necessarily applicable only to the state of facts presented, if there has been any misstatement, or slip, however, innocent, the opinion or advice will be no protection.

*Re Barrington's Settlement*, 1 J. & H. 142.

Petition for advice.

*Re Harley's Estate*, 17 P. R. 484.



Osler, J.A.—Petition by executrix for the construction of the will and direction as to advertising for next of kin of the testator, John Harley.

I must refuse this petition in the absence of any of the heirs or next of kin of the testator.

I cannot give an opinion as to the right of the executrix to dispose of the residue of the estate in accordance with the directions of the will, viz., "amongst churches and charities, or otherwise as he may see fit." It is quite possible, having regard to the date of the will, the vagueness of the language, and the nature of the estate, that the direction may prove ineffectual. Certainly, in the absence of the next of kin, it would be a dangerous experiment for the petitioner to attempt to comply with it. I see not why she needs to concern herself in the matter at all. She has paid the debts, and the one legacy about which there could be no question, and some years ago she obtained an order for leave to pay the balance in her hands into Court. She paid it accordingly, and she is, it seems to me, discharged from all further responsibility, especially as she or the former executor had advertised for heirs, and next of kin will find it when they apply for it, or where the Crown may do so if it ever desires to establish a claim.

I asked for precedents but the petitioner has been unable to refer me to any, and my own search has been equally fruitless.

I make no order.

*Re Mathers*, 18 O. R. 14.

Meredith, J.—The application, in so far as it seeks advice is made under the provisions of sec. 37 of c. 110, R. S. O. 1887, only, and not under any of the provisions of the new Rules.

That statute gives liberty to apply for the opinion, advice or direction of a Judge on any question respecting the management or administration of trust property or the assets of a testator or intestate.

The application in this respect is for an order or direction determining the claim of the statutory guardian of the infant beneficiaries to the fund in question.

It seems to me that such a claim can hardly be said to be a question respecting the management of the trust property. But, if it be, it also seems to me to be one of so much difficulty and importance that it ought not to be dealt with on an application of this character.

See *Re Williams* (1895), 22 A. R. 196.

**1174.** The originating notices referred to in the last quoted judgment are as follows: They will be extensively acted upon.

CONSOLIDATED RULES OF PRACTICE RELATING TO  
ORIGINATING NOTICES.

**938.** The executors or administrators of a deceased person or any of them, and the trustees under any deed or instrument or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, next of kin or heir at law of a deceased person, or as *cestui que trust* under the trusts of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may serve a notice of motion returnable before a Judge of the High Court in Chambers for such relief of the nature or kind following, as may be specified in the notice, and as the circumstances of the case may require, that is to say, the determination without an administration of the estate or trust of any of the following questions or matters:—

(a) Any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next of kin or heir-at-law, or *cestui que trust*.

(b) The ascertainment of any class of creditors, legatees, devisees, next of kin, or others.

(c) The furnishing of any particular accounts by the executors or administrators or trustees, and the vouching (where necessary) of such accounts.

(d) The payment into Court of any money in the hands of the executors or administrators or trustees.

(e) Directing the executors or administrators or trustees to do or abstain from doing any particular act in their character as such executors or administrators or trustees.

(f) The approval of any sale, purchase, compromise or other transaction.

(g) The opinion, advice or direction of a Judge pursuant to section 37 of the Act respecting Trustees and Executors, and the administration of Estates.

(h) The determination of any question arising in the administration of the estate or trust. New.

**939.** The persons to be served with notice under the last preceding Rule in the first instance shall be the following, that is to say:—

1. Where the notice is served by an executor or administrator or trustee:

(a) For the determination of any question under clauses (a), (c), (f), (g) or (h) of Rule 938, the persons or one of the persons whose rights or interests are sought to be affected;

Where notice served by executors, etc.

(b) For the determination of any question under clause (b) of Rule 938, any member or alleged member of the class;

(c) For the determination of any question under clause (c) of Rule 938, any person interested in taking such accounts;

(d) For the determination of any question under clause (d) of Rule 938, any person interested in such money;

(e) If there are more than one executor or administrator or trustee, and they do not all concur in the service of the notice, those who do not concur.

Where served by some other person. 2. Where the notice is served by any person other than the executors, administrators or trustees, the said executors, administrators or trustees. New.

Special directions as to service. 940. The Judge may direct such other persons to be served as may seem just. New.

Summary judgment or order. 941. The Judge may summarily dispose of the questions arising on the application and make such judgment or order as the nature of the case may require, or may give such directions as he may think just for the trial of any questions arising upon the application. New.

Carriage and service of judgment or order. 942. Any special directions, touching the carriage or execution of the judgment or order, or the service thereof upon persons not parties, may be given as may seem just. New.

Interference with discretion of trustees, etc. 943. Service of a notice under Rule 938, shall not interfere with, or control any power or discretion vested in any executor, administrator or trustee, except so far as such interference or control may necessarily be involved in the particular relief sought. New.

#### ADMINISTRATION.

Creditors, legatees, next of kin, heirs or devisees may apply on motion in Chambers for administration. 944. Any person claiming to be a creditor, or a specific, pecuniary, or residuary legatee or the next of kin, or one of the next of kin, or the heir, or a devisee interested under the will of a deceased person, may apply to the Court or a Judge upon motion, without an action being instituted, or any other preliminary proceeding, for judgment for the administration of the estate, real or personal, of such deceased person. Con. Rule 965.

Fourteen day's notice of motion. 945. The notice of motion shall be served upon all necessary parties, including the executor or administrator, 14 clear days before the day named for hearing the application, and shall be according to Form No. 59, Con. Rule 966.

Form of notice. Upon proof of 946.—(1) Upon proof of service of the notice of motion, or on the appearance in person, or by his solicitor or counsel, of the executor or administrator, and such other necessary parties, if any, and

upon proof by affidavit of such other matter, if any, as may be required, the Court or Judge may award judgment for the administration of the estate of the deceased. Con. Rule 967.

(2) The judgment may be according to the Forms 156 or 157 as may be necessary. New.

**947.**—(1) An adult person entitled to apply, under Rules 944 to 950, for a judgment for administration may apply to the Master in the County town of the County (other than the County of York), where the deceased person, whose estate is to be administered, resided at the time of his death; and the Master may, subject to Rules 945, 946, 948, 949 and 951, award judgment for administration according to Form No. 156. Con. Rule 972.

(2) A Local Master shall not entertain the motion for judgment where the same is opposed, but the same shall be adjourned to come before a Judge of the High Court in Chambers. New.

**948.** A judgment for the administration of an estate in which an infant is interested shall not be made until the infant is represented by the Official Guardian. Rules 13 Sept., 1890, 1270.

**949.** Special directions touching the carriage or execution of the judgment may be given as may be deemed expedient; and in case of applications by two or more persons, or classes of persons, judgment may be granted to one or more of the claimants as may seem just; the carriage of the judgment may be subsequently given to other persons interested. Con. Rule 968.

**950.** An executor or administrator may apply for judgment for administration. Con. Rule 969.

**951.** Accounts or inquiries in respect of the real estate shall not be directed, unless notice of the application has been given to persons interested therein, or in whom the same is invested, or one or more of them. Con. Rule 970.

**952.** Where inquiries have been directed in respect of the personal estate only, the Court or Judge may afterwards, upon notice being given to persons interested in the real estate, or in whom the same is vested, or to one or more of them, make a supplemental order in respect of the real estate upon such terms as may seem just. Con. Rule 971.

**953.**—(1) Where judgment for administration is granted according to Form 156, the Master to whom the matter is referred shall proceed to administer the estate in the most expeditious and least expensive manner, and in doing so, shall make amongst other

service of notice or on appearance of personal representative, order for administration may be granted. Adult person may apply to Local Master for administration of deceased person's estate. Opposed motions to come before a Judge. Representation of Infants. Special directions may be given respecting carriage of order, etc. Carriage of order may subsequently be changed. Order may be obtained by personal representative. No accounts to be ordered of realty unless heir or devised served. Accounts of realty may be directed by supplemental order. Master's proceedings to administer.

inquiries, and take amongst other accounts, the inquiries and accounts mentioned in Form 157, or such of them as may be applicable and necessary. New. See Con. Rules 972.

Master to have full power to deal with realty, personalty, and dispose of costs, etc.

(2) The Master shall, under any such reference, have power to deal with both the realty and personalty of the estate, the subject of administration, and shall dispose of the costs and finally wind up all matters connected with the estate, without any further directions, and without any separate, interim, or interlocutory reports, or orders, except where the special circumstances of the case absolutely call therefor. Con. Rule 973.

Moneys realized to be paid into Court and not paid out except on Judge's order.

(3) All moneys realized from the estate shall forthwith be paid into Court, and subject to Rule 47, no moneys shall be distributed or paid out for costs or otherwise, without an order of a Judge of the High Court in Chambers, or the Court, and on the application for an order for distribution, the Judge or the Court may review, amend, or refer back to the Master his report, or make such other order as may seem just. Con. Rule 974.

Court, etc., not bound to order administration.

**954.** It shall not be obligatory on the Court or Judge, or Local Master to pronounce or make a judgment or order, whether on any summary application or otherwise, for the administration of any trust, or of the estate of any deceased person, if the questions between the parties can be properly determined without such judgment or order. New.

Orders other than for administration which may be made.

**955.** In any action or proceeding for the administration or execution of trusts by a creditor or beneficiary under a will, intestacy or instrument of trust, where no accounts, or insufficient accounts have been rendered, the Court or a Judge may in addition to any powers already existing:

(a) Order that the executors, administrators or trustees, shall render to the plaintiff or applicant a proper statement of their accounts, with an intimation that if it is not done, they may be made to pay the costs of the proceedings, and the Court or Judge may direct the action or proceeding to be stayed or to stand over in the meantime, as may seem just.

(b) Where necessary, to prevent proceedings by other creditors, or by beneficiaries, make the usual judgment for administration, with a provision that no proceedings are to be taken thereunder, without the leave of the Court or a Judge. New.

Statutes of Limitation.

**1175.** The general position of a trustee has been further fortified by the extension of the Statutes of Limitation to cover the case of trusts. The statutory authorities are as follows:

**Section 9 of chapter 72 of the Revised Statutes provides:**

9. No action or other proceeding shall be brought to recover the personal estate, or any share of the personal estate of a person dying intestate, possessed by the legal personal representative of such intestate, but within twenty years next after a present right to receive the same accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part thereof of the estate or share, or some interest in respect thereof has been accounted for or paid, or some acknowledgment of the right thereto has been given in writing, signed by the person accountable for the same, or his agent, to the person entitled thereto, or his agent; and in such case, no action shall be brought but within twenty years after such accounting, payment or acknowledgment, or the last of such accountings, payments or acknowledgments, if more than one, was made or given. R. S. O. 1887, c. 60, s. 9.

**1176. Section 58 (1) of the Judicature Act (R. S. O. 1897, c. 51), thus provides:**

1. Subject to the provisions of section 32 of the Trustee Act, no claim of a cestui que trust against his trustee for any property held on an express trust or in respect of any breach of such trust shall be held to be barred by any Statute of Limitations. Ont. Acts, 1895, c. 12, s. 53 (1); Ont. Acts, 1896, c. 18, Sched. (4).

**1177. Section 32 of the Trustee Act referred to in the last section is as follows:**

32. (1) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof, still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:

- (a) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through a trustee.
- (b) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of, and be at

liberty to plead, the lapse of time as a bar to such action or other proceeding, in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received; but so, nevertheless, that the statute shall run against a married woman entitled in possession for her separate use, whether with or without restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary becomes an interest in possession.

(2) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary, than he could have obtained if he had brought the action or other proceeding, and this section had been pleaded.

(3) This section shall apply only to actions or other proceedings commenced after the first day of January, 1892, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing statute of limitations. R. S. O. 1897, c. 129, s. 32. Ont. Acts, 1891, c. 19, s. 13.

Applica-  
tion of  
R. S. O.  
c. 129, s. 9.

**1178.** A testator by his will devised land to his son James, subject to the payment of an annuity to his widow for her life, after the expiration of a lease given by the testator; and directed his executors to apply the rent derived from the land so devised in payment of an incumbrance thereon, "so that my son may have the said property, at the expiration of the said lease, free from all incumbrance"; and he then directed that his son James should pay one-half of the sums thereafter bequeathed to each of his daughters, as soon as his son Daniel should attain the age of twenty-one; and to the latter he devised other land, and directed him also to pay one-half of the bequests to the daughters. Then followed the bequests to his daughters with names and amounts, to be paid to them in equal shares by his sons James and Daniel on the latter attaining the age of twenty-one. The will was entirely silent as to the debts of the testator.

James adopted the devise to him, took possession of the land, and dealt with it as his property for many years.

Held, that the one-half of the legacies to the daughters was charged upon the lands devised to James.

Held, that the latter part of section 20 of R. S. O. cap. 129, applies to wills coming into operation after as well as before the 18th September, 1865.

Held, lastly, that section 9, cap. 129, did not apply; because the money was not money payable upon an express or implied trust, or for a limited purpose, within the meaning of the section.

*Grey v. Richmond*, 22 O. R. 256. See paragraphs 477, 484.

## CHAPTER II.

### MATTERS AFFECTING PROCEDURE.

**1179.** The following rules of practice are selected as applying particularly to executors and administrators. Rules 703-715 relating to administration suits are not printed and must be referred to in practice books.

**193.**—Trustees, executors and administrators may sue and be Trustees, sued on behalf of, or as representing, the property or estate of which executors they are trustees or representatives, without joining any of the per- and ad- sons beneficially interested, and shall represent them; but the Court tors. or a Judge may, at any time, order any of them to be made parties in addition to, or in lieu of, the previous parties.

Rule 194 provides that if a deceased person has no personal representative, proceedings may go on, or the Court may appoint a representative.

Rule 195 appears as foot note on page 34, *ante*.

**196.**—Where an order for general administration is not asked Order for or required, or where it is shewn that an executor de son tort has account against taken possession of the bulk of the personal assets belonging to the executor de son tort estate of a deceased person, he may on the application of any one interested in the estate of the deceased, without the appointment of any personal representative, be required to account for any assets



of the estate which have come to his hands; and where a case is made for the appointment by the High Court of a receiver of the estate of a deceased person who has no personal representative, the estate may be administered under the direction of the Court without the appointment of any person other than the receiver to represent the estate.

Where parties are numerous.

**200.**—In an action where there are numerous parties having the same interest, one or more of such parties may sue or be sued, or may be authorized by the Court to defend, on behalf of, or for the benefit of, all parties so interested.

Rule 201 provides that persons may be appointed to represent a class, and the judgment of the Court shall be binding upon the class represented.

Rule 202 provides that the Court may proceed though some of the parties interested are not before it.

Cases where one of a class may sue without joining others.

**203.**—An objection for want of parties shall not lie in any of the following cases,—

(a) A residuary legatee, or next of kin, may have a judgment for the administration of the personal estate of a deceased person without serving the other residuary legatees or next of kin.

Residuary legatee, etc.

(b) A legatee interested in a legacy charged upon real estate; or a person interested in the proceeds of real estate directed to be sold, may have a judgment for the administration of the estate of a deceased person without serving any other legatee or person interested in the proceeds.

Legatee whose legacy is charged on realty.

(c) A residuary devisee, or heir, may have the like judgment, without serving any other residuary devisee or heir.

Residuary devisee or heir.

(d) One cestui que trust, under an instrument, may have a judgment for the execution of the trusts of the instrument, without serving the other cestuis que trustent.

One of several c. q. t.

(f) An executor, administrator, or trustee, may obtain a judgment against any one legatee, next of kin or cestui que trust, for the administration of the estate or the execution of the trusts.

Administration against one c. q. t.

Death of one of joint obligees.

**1180.** Where one of two joint obligees, covenantees or partners dies the action on the contract must be brought in the name of the survivor, and the executor or administrator of the deceased cannot be joined nor can he sue separately.

Surviving partner.

**1181.** Though the right of a deceased partner devolves on his executor, yet the remedy survives to his companion, who alone must enforce the right by action.

and will be liable, on recovery, to account to the executor or administrator for the share of the deceased.

*Hall v. Hufham*, 2 Lev. 118.

**1182.** Where two have the legal interest in the performance of a contract, though the benefit be only to one of them, the remedy survives upon the death of the latter, and the executor or administrator of the deceased cannot be made a party or sue separately.

Survival of legal interests.

See *Gildersleeve v. Balfour*, 15 P. R. 293, referred to, *ante* paragraph 355.

**1183.** Where a contract is made jointly with several persons, and they all die, the executor or administrator of the survivor alone can sue, and the personal representatives of those who die before him cannot be joined.

Last survivor of joint contractors.

**1184.** But if the interest of the covenantees is several, and one of them dies, his executor may maintain a separate action on the covenant, notwithstanding the other covenantee be living.

Several interests.

**1185.** If the interest be several it makes no difference that the language of the covenant is joint. Wherever the interest of the covenantees is joined the rule of survivorship is applied.

**1186.** If one or more of several parties jointly interested in property, at the time an injury was committed, is dead, the action must be in the name of the survivor, and the executor or administrator of the deceased cannot be joined, nor can he be sued separately.

Joint ownership of property injured.

**1187.** If there are several executors or administrators they must all join in bringing actions, though some are within the age of seventeen years, or have not proved the will.

Several executors.

*Brookes v. Stroud*, 1 Salk. 3.

**1188.** Where, however, one executor of several has alone proved the will, he may sue without making the other executors parties, although they have not renounced. If one of several executors, who have all proved the will, sue alone, the defendant may apply to the Court for an order that the other executor or executors may be joined as co-plaintiffs.

Sale by  
one execu-  
tor.

**1189.** If one executor, of several, alone, sell goods of the testator, he alone may maintain an action for the price, not naming himself executor. So, if goods be taken out of the possession of one of several executors, he may sue alone to recover them. And, generally, if one executor alone contracts on his own account alone, he must sue alone on such contract, notwithstanding the money recovered will be assets.

*Heath v. Chilton*, 12 M. & W. 632.

Evidence  
of vesting  
of prop-  
erty.

**1190.** Although the executor derives his title from the will by which he is appointed, and not from the probate of the will, yet it is the probate alone which authenticates his right, and the probate, or something tantamount thereto, is the only legitimate evidence of property being vested in an executor, or of, the executor's appointment.

*Hamilton v. Aston*, 1 Carr. & Kew. 679.

Title of  
adminis-  
trator.

**1191.** The title of an administrator may be proved by the production of the letters of administration, or of a certificate or exemplification thereof granted by the Surrogate Court.

*Kempton v. Cross*, Cas. temp. Hardw. 108.

Joint  
mortga-  
gees.

**1192.** Where a mortgage is made to several persons jointly they are tenants in common of the mortgage money, and the representatives of such of them as may be dead are necessary parties, with the survivor, to a suit for foreclosure or redemption.

*Vickers v. Cowell*, 1 Beav. 529.

**1193.** One executor may sue another. If one of the executors of a mortgage be himself the mortgagor, the remedy sought by the co-executors should not be for a foreclosure but for a sale.

*Luegg v. Seale*, 2 Atk. 56.

**1194.** The Court will, after a decree made in an ordinary administration suit, restrain proceedings in a foreign country for the administration of the personal estate, and of the real estate as well, unless it can be shown that the party instituting the suit can carry on proceedings as to the landed estate without proceeding as to the personal estate.

*Hope v. Carnegie*, 1 L. R. 320.

**1195.** No suit can be brought against any executor or administrator in his official capacity in the Court of any country, but that from which he derives his authority to act by virtue of the probate or letters of administration there granted to him. Therefore, if a foreign creditor wishes a suit to be brought in Ontario in order to reach the effects of a deceased testator or intestate situated in Ontario it will be necessary before the suit can be maintained, notwithstanding an executor or administrator has been appointed abroad, that an Ontario personal representative should also be duly constituted by grant from the proper Court here, for the foreign executor or administrator is not liable to be sued in his official character in this country.

*Flood v. Patterson*, 20 Beav. 295.

See sections 153 *et seq.* 386, 387.

**1196.** An action at law for a legacy or for a distributive share of an intestate's property could not be maintained against the personal representative, although he might have expressly promised to pay; but after the assent by an executor to a specific legacy, he is clearly liable at law to an action by the legatee, because the interest in any specific thing bequeathed vests at law in the legatee upon the assent of the executor.

Pleading  
denial of  
executor-  
ship.

**1197.** If a defendant intends to deny his being executor or administrator, he must plead such denial specially, otherwise he will admit his representative character.

Onus of  
proof.

**1198.** On the trial of an issue joined on this plea, the onus of proof is on the plaintiff, who has to prove the affirmative of the proposition. The plea does not deny the cause of action, but only that the defendant is one of the representatives of the testator or intestate.

Express  
promise  
required.

**1199.** The mere existence of a debt owing by the testator or intestate is not evidence of a promise to pay by the executor or administrator as executor or administrator. Hence, as against an executor or administrator, an acknowledgment merely by him of the debt's existence is not sufficient to take the case out of the statute. There must be an express promise.

*Tullock v. Dunn, Ryan & M. 417.*

**1200.** R. S. O. 1897, c. 146, sections 1, 2, & 3, are as follows:

Promise  
by words  
only not  
sufficient  
to take the  
case out of  
the Statute  
of Limita-  
tions.  
21 Jac. 1  
c. 16.

1. No acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby to take out of the operation of the Act passed in England in the twenty-first year of the reign of King James the First, any case falling within the provisions of the said Act respecting actions—

(a) Of account and upon the case other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants;

(b) On simple contract, or of debt grounded upon any lending or contract without specialty, and

(c) Of debts for arrears of rent;

or to deprive any party of the benefit thereof, unless such acknowledgment or promise is made or contained by or in some writing, signed by the party chargeable thereby, or by his agent duly authorized to make such acknowledgment or promise. R. S. O. 1887, c. 123, s. 1.

Case of  
two or  
more joint  
contract-  
ors or  
executors.

2. Where there are two or more joint contractors or executors, or administrators of any contractor, no such joint contractor, executor or administrator shall lose the benefit of the said Act, so as to be chargeable in respect, or by reason only of any written acknowledgment

or promise made and signed by any other or others of them, or by reason of any payment of any principal or interest made by any other or others of them. R. S. O. 1887, c. 123, s. 2.

3. In actions commenced against two or more such joint contractors, Judgment executors or administrators, if it appears at the trial or otherwise that where the plaintiff, though barred by the said Act of King James the First, or is barred by this Act, as to one or more of such joint contractors, or executors, or as to one or more administrators, is nevertheless entitled to recover against any other or defendants of the defendants by virtue of a new acknowledgment, promise, or payment, as aforesaid, judgment shall be given for the plaintiff as to the defendant or defendants against whom he recovers, and for the other defendant or defendants against the plaintiff. R. S. O. 1887, c. 123, s. 3.

**1201.** An express promise to pay made to a third party may enure to the benefit of an administrator de bonis non with the will annexed, though at the time of such promise he had not obtained letters of administration.

*Beard v. Ketchum*, 6 U. C. R. 470.

Admission to person who afterwards takes out letters.

*Robertson v. Burrill*, 22 A. R. 356.

See *Goodman v. Boyes*, 17 A. R. 528.

**1202.** A defendant sued as executor or administrator cannot set off a debt due to himself personally, nor, if sued for his own debt, can he set off what is due to him as executor or administrator, because the debts sued for and intended to be set off must be mutual and due in the same right.

*Gale v. Luttrell*, 1 Younge & Jerv. 180.

**1203.** Whenever a tender with tout temp prist is pleaded by an executor or administrator he must allege that his testator or intestate was at all times from the time of making the promise to the time of his death, ready to pay, and that he, the defendant, has at all times since the death of his testator or intestate, been ready to pay.

*Climents v. Reynolds*, Sayer, 18.

With a defence of tender before action money must be paid into Court. C. R. 438.

*Plene ad-  
ministravit.*

**1204.** If the executor or administrator has not assets to satisfy the debt upon which an action is brought against him, he must plead plene administravit or plene administravit praeter. For a judgment against an executor or administrator is conclusive upon him that he has assets to satisfy such judgment. But if the executor plead either a general or special plene administravit, it is now held that he is liable only to the amount of assets proved to be in his hands. The essential part of the plea of plene administravit is that the "said defendant has no goods which were of the said A. B. (the testator) at the time of his death in the hands of the said defendant as executor to be administered or had at the commencement of the suit or ever since."

*Plea of  
retainer.*

**1205.** An executor or administrator might formerly either plead a retainer for a debt due to him from the deceased, or give it in evidence under a plea of plene administravit. So he may either plead or show in evidence under that plea that he retains assets to a certain amount for the expenses of the funeral, or of taking out administration or to reimburse himself for payments made out of his own pocket in discharge of debts of the estate before the commencement of the suit.

Boh. N. P. 140.

*Replica-  
tion of  
fraudulent  
judgment.*

**1206.** Where an executor pleads that he has no assets ultra a judgment which in truth was recovered against him upon an unjust or fictitious debt, a plaintiff may reply that the judgment was had and obtained by fraud and covin between the executor and the creditor. So the plaintiff may reply that the judgment was kept on foot by covin to defraud the creditors.

*Onus of  
proof of  
assets.*

**1207.** If an executor or administrator pleads plene administravit, and the plaintiff replies that the defendant had assets at the commencement of the suit, whereupon issue is joined, the burden of proof lies upon the plaintiff, who must prove that assets existed or ought

to have existed in the hands of the defendant at the time of the writ sued out.

*Webster v. Blackman*, 2 F. & F. 490.

**1208.** In order to prove assets the plaintiff may give in evidence the inventory exhibited by the defendant in the Surrogate Court, and after the inventory is put in it is for the defendant to discharge himself of the items.

*Inventory may be given*

*Giles v. Dyson*, 1 Stark. N. P. C. 32.

**1209.** An admission by the defendant that the debt is a just debt, or a promise to pay it as soon as he can, is not evidence to charge him with assets, for such an admission must be understood with a reasonable intentment, and the executor could not mean to pledge himself to commit a devastavit.

*Admission of executor*

**1210.** In addition to the proof of assets it will be necessary for the plaintiff, in an action of assumpsit, to prove the amount of the debt, otherwise he shall recover but nominal damages, for the plea only admits a debt, but not the amount, but where a specific debt is demanded, as in an action of debt, if the defendant pleads plene administravit without pleading also nunquam indebteditatus, there the debt is admitted by the plea, and need not be proved.

*Proofs of claim required*

*Samuelson v. Nicholls*, 1 Show. 81.

**1211.** In answer to the proof of assets the executor or administrator may show that he has exhausted the assets by discharging other demands on the estate, or he may show that he has disbursed the assets in the expenses of the funeral, or of probate or administration, or in the reasonable charges of collecting the debts of the deceased. He may show that he has retained money in his hands to pay for the expenses of administration to which he has made himself liable, without proving that he has paid them.

*Defense of executor*

*Gilles v. Smither*, 2 Stark. N. P. C. 528.



Reply by  
plaintiff.

**1212.** Where the executor shows payments made by him to the extent of the assets proved by the plaintiff to have come to his hands, the plaintiff may show, in answer, that the funds so applied did not come to the defendant as executor, but were handed to him in trust to pay the testator's debts, and were not part of the assets first proved to have come into his hands.

*Murston v. Downes*, 1 Adol. & Ell. 31.

Debts paid  
*pendente*  
*lite*.

**1213.** If the defendant has applied the assets in payment of debts since the commencement of the suit, he must plead that matter specially.

Laches of  
creditor.

**1214.** If, in the distribution of assets a creditor misleads an executor, either by laches or express authority, so as thereby to induce him to pursue a course he would not otherwise have pursued, the creditor is precluded from complaining of an insufficiency of assets.

*Jewsbury v. Mummery*, L. R. 8 C. P. 56.

Costs of  
executors  
not privi-  
leged.

**1215.** Executors and administrators, when defendants, have no privilege as to costs, on the contrary, they are liable to pay them *de bonis propriis* if there are no assets. Therefore, an executor or administrator ought not to plead general defences without a good reason; for if the plaintiff succeeds the executor will be liable to pay the costs out of his own pocket, although the plea was not false to his knowledge, but, as in ordinary cases, an executor or administrator defendant will be entitled to the general costs, although he may have pleaded a general defence and failed on it, provided he has pleaded any one defence that goes to the whole cause of action, and succeeded on it.

See *Smith v. Williamson*, 13 P. R. 126, and paragraph 1167.

Judgment  
of assets  
quando.

**1216.** In an action against an executor or administrator, if the defendant pleads *plene administravit*, and it cannot be proved that he has assets in hand, the plaintiff may sign judgment immediately of assets *quando acciderint*, or as it used to be called sometimes,

judgment of assets in futuro. This judgment is either interlocutory or final, according to the nature of the action.

**1217.** If it be only interlocutory there must be a writ of enquiry, or other proceeding to complete it. Interlocutory judgment.

**1218.** By taking judgment of assets quando the plaintiff admits that the defendant has fully administered to that time. Accordingly, the terms of the judgment are that the plaintiff has recovered his debt to be levied of the goods of the testator which shall thereafter come to the hands of the executor. In subsequent proceedings on this judgment, proof of the executor's receiving assets is always confined to a period subsequent to the judgment. Result of judgment of assets quando.

I think that under the Judicature Act, and having regard to the change in the law making all debts of deceased persons in case of a deficiency of assets payable *pari passu*, the proper judgment in all actions in the High Court against executors or administrators, when there is a recovery of money, and assets are not admitted is the judgment which was always pronounced in Chancery in such cases, namely, a judgment for payment in due course of administration, or, in other words, a judgment for the administration of the estate.

*McKibbin v. Feegan*, 21 A. R. 95, per MacLennan, J.A.

**1219.** When an executor or administrator pleads plene administravit, or judgments, etc., outstanding, and plene administravit præter, and the plaintiff takes judgment of assets quando, the executor or administrator is not liable to costs de bonis propriis, but though an executor or administrator is not personally liable to pay the costs, judgment may be well entered for them to be recovered de bonis testatoris quando acciderint. Liability of executor for costs.

*Cox v. Peacock*, 4 Dowl. 134.

**1220.** There were formerly two modes of enforcing a judgment obtained against an executor de bonis testatoris: Modes of enforcing judgment against executor de bonis testatoris.

1. By fieri facias or scire fieri enquiry.

2. By an action of debt on the judgment suggesting a devastavit.

If the sheriff returns, as he may do if he pleases, not only nulla bona, but also a devastavit to a fieri facias de bonis testatoris sued out on a judgment obtained against an executor, the plaintiff, according to the ancient practice, sued out execution immediately against the defendant by *capias ad satisf.*, or *fieri facias de bonis propriis*, and so he may at this day.

The sheriff runs no risk by returning a devastavit for the judgment, and no assets to be found will be sufficient evidence of a devastavit in an action against him for a false return.

*See* *K. v. Leighton*, cited 3 T. R. 692.

Return by  
sheriff.

**1221.** If the sheriff returned nulla bona generally, without also returning a devastavit, the ancient course was to issue a special writ for the sheriff to enquire by a jury whether the defendant had wasted any of the goods of the deceased.

*Scire fieri*  
*enquiry.*

**1222.** If a devastavit were found and returned by the sheriff a *scire facias* issued by the defendant to shew cause why the plaintiff should not have execution de bonis propriis, to which *scire facias* the defendant might appear and plead. Subsequently the enquiry and *scire facias* were made in one writ, which was called a *scire fieri enquiry*. The most usual mode to proceed was by an action of debt on the judgment, suggesting a devastavit, because the plaintiff was formerly not entitled to costs unless the executor appeared and pleaded to the *scire facias*.

**1223.** Now in all writs of *scire facias* the plaintiff obtains judgment on an award of execution, recovers his costs of suit upon a judgment by default as in other cases.

Defence  
of execu-  
tor.

**1224.** The executor cannot plead *plene administravit* to the *scire fieri enquiry*, because the judgment

against him is conclusive that he had assets to satisfy it. Neither can he, upon the taking of the inquisition, give in evidence the want of assets. He may prove that he had not wasted the goods of the testator; he was ready to give them to the sheriff, so that it was the sheriff's fault that he did not make the debt out of them.

2 Bingh. N. C. 180, 181.

**1225.** The foundation of the action of debt on the judgment suggesting a devastavit is the judgment obtained against the executor, which is conclusive upon him to show that he has assets to satisfy such judgment. Action of debt on judgment suggesting devastavit. If, therefore, upon a fieri facias de bonis testatoris on a judgment obtained against an executor either no goods can be found which were the testator's, or not sufficient to satisfy the demand, or which is the same thing, if the executor will not expose them to the execution, that is evidence of a devastavit, and, therefore, it is very reasonable that the executor should become personally liable and chargeable de bonis propriis. The most usual course is first to sue out a fieri facias upon the judgment, and upon the sheriff's return of nulla bona to bring the action, and state the judgment, the writ and the return in the statement of claim. On the trial the record of the judgment, the fieri facias and the return will be sufficient evidence to prove the case. The executor becomes personally liable and chargeable de bonis propriis.

**1226.** The executor may defend, and set up that he did not waste, and under this defence he may give in evidence that there were goods of the testator which might have been taken in execution, and that he showed them to the sheriff. But the executor cannot set up the defence of plene administravit, or any other defence which rests upon want of assets. Such a defence would be contrary to what is admitted upon the judgment. If the truth were that he had no assets, he should have set it up as a defence to the original action, and having Defence of executor.

neglected to do so he cannot be permitted to say so afterwards, at all events without a special application to the Court.

Death of  
judgment  
creditor.

**1227.** If a man obtains judgment against an executor, and dies, his executor may bring an action upon the judgment against the executor suggesting a devastavit, for such an action is brought against the same person against whom the judgment was had, and by that judgment assets were admitted.

Action  
against  
representa-  
tive of  
executor.

**1228.** So, on the other hand, if a judgment was had against an executor, who afterwards dies, an action may, since 30 Chas. II. c. 7, extended and made perpetual by 4 & 5 Wm. & M. c. 34, be brought against his executor or administrator upon the judgment suggesting a devastavit by the first executor, and the judgment is as conclusive upon the representative of the executor as it is upon the executor himself. No action of debt, suggesting a devastavit by the executor, lies against him upon a judgment obtained against his testator, because that is no admission of assets by the executor; therefore, in such cases, it is necessary to revive the judgment against the executor to make him a party to it.

Death of  
testator  
after  
execution.

**1229.** If the testator died after execution was sued out the writ may be still executed on his goods in the hands of his executors without taking any further proceedings, but if a defendant dies after final judgment, and before execution, the plaintiff must revive the judgment before he proceeds.

Death of  
lessee of  
lands.

**1230.** Where the lessee of lands dies before the expiration of the term, and his executor or administrator continues in possession during the remainder, distress may be taken for rent due for the whole term, the executor or administrator cannot plead plene administravit in answer; so the distress may be taken by virtue of 8 Anne c. 14, ss. 6 and 7, within six months after the administration of the tenancy if the executor or administrator continues in possession.

**1231.** An executor or administrator is liable in his <sup>Equitable</sup> representative character to all equitable demands with <sup>demands.</sup> regard to property which existed against the deceased at the time of his death.

**1232.** Again, executors and administrators were in <sup>Adminis-</sup> almost every respect considered, in Courts of Equity, as <sup>tration of</sup> trustees. Upon this principle those Courts exercised a <sup>Court of</sup> jurisdiction over them in the administration of assets, <sup>Equity.</sup> by compelling them in the due execution of their trust to apply the property to the payment of debts and legacies, and of surplus according to the will, or in case of intestacy, according to the Statute of Distributions.

See paragraph 1168 *et seq.*

**1233.** Therefore a Court of Equity would make an <sup>Account</sup> order for payment of an intestate's personal estate, or <sup>compelled.</sup> for the distribution of an intestate's personal estate, and would compel an executor or administrator in the same manner as it does an express trustee, to discover and set forth an account of the assets, and of his application of them.

**1234.** Even in a case where the testator directed that the executor should not be compelled by law to declare the amount of a residue bequeathed to him, the Court directed an account against him.

*Massey v. Massey*, 2 Johns. & H. 728.

**1235.** A single creditor may sue in Equity for his <sup>Suit by</sup> demand out of the personal assets, but a person entitled <sup>single</sup> to a share of money, which is due as a debt from the <sup>creditor</sup> testator, cannot maintain a bill for his own share, unless he sues on behalf of himself and of other parties <sup>in Equity.</sup> interested in the debt, or makes those persons parties to the suit.

*Alexander v. Mullins*, 2 Russ. & M. 568.

See, however, Rules *supra* paragraph 1179.

**1236.** A Court of Equity always allowed a creditor to sue on behalf of himself and the other creditors of

the deceased, and has thereupon directed a general account of the estate and debts to be taken against the executor or administrator, or where assets were admitted, and the debt admitted for proof, has made an immediate decree for payment.

*Woodgate v. Field*, 2 Hare, 211.

Legatees  
or distri-  
butees.

**1237.** Although the Court entertains suits by creditors, legatees, and parties entitled in distribution on behalf of themselves and all others, and to exonerate the executor or administrator for payment of assets pursuant to its decree, yet it is not to be understood that such a decree is absolutely binding upon the absent creditors, legatees or distributees who have had no opportunity of proving their claims, and have been guilty of no laches, so that they are entitled to no redress, but are to be deemed concluded. On the contrary, although they have no remedy against the executor or administrator, yet they have a right to assert their claim against the creditors, legatees or distributees who have received it.

Legatees entitled to a share of the residue of an estate are not bound by the accounts and proceedings in an administration action instituted by other residuary legatees in which they have not been added as parties, and of which they have received no notice. The judgment in such an action, however, enures to their benefit, and makes a fresh starting point in their favour as against the defence of the Statute of Limitations.

Per Maclellan, J.A.—In the absence of reasonable efforts by the executors of an estate to discover the whereabouts of persons entitled to share in the residue, they are not protected if they, even under the order and direction of the Court, distribute the residue among the other persons entitled.

Per Curiam.—Persons who have received a share of the residue under such circumstances must refund for the benefit of the persons whose claims have been ignored the amount received in excess of the sum payable if the division had been properly made.

*Uffner v. Lewis*, 20 C. L. T. 296.

Executors  
may be  
sued for

**1238.** Although an executor has a year allowed him in Equity to pay legacies, yet that does not extend

to debts, but he is liable to be sued the moment after the testator's death.

debts at  
once

*Nicholls v. Judson*, 2 Atk. 301.

**1239.** The general rule is that if there are several executors or administrators, they must all be sued, though some of them be infants; therefore, a person cannot, either as creditor or residuary legatee, maintain a suit in Equity against one co-executor only; but it is only necessary to sue so many of the executors or administrators as have acted.

All execu-  
tors must  
be sued.

**1240.** An estate cannot be administered in the Court of Equity in the absence of a personal representative; therefore, if the statements in the case demonstrate that the Court cannot give the plaintiff the relief which he asks without an administration of the estate, there must be a personal representative of it before the Court.

Personal  
representa-  
tive re-  
quired.

*Ambler v. Lindsay*, 3 C. D. 198.

**1241.** If the estate is to be administered, an executor de son tort being before the Court will not dispense with the presence of a regular representative. He is only treated as executor for the purpose of being charged, not for any other purpose.

Executor  
de son  
tort.

*Rayner v. Kochler*, L. R. 14 Eq. 262.

**1242.** Where there is no personal representative, but a special representative limited to the subject of the suit has been appointed by the Court, the estate of the deceased is properly represented in the suit; inasmuch as the executor or administrator is the trustee and proper representative of all persons interested in the personal estate, and has the duty cast on him of protecting it against improper demands, it is not necessary or proper to join either a pecuniary or residuary legatee or the next of kin as a party to an action against the executor or administrator for an account of the personal estate, however interested such persons may be to test the demand which has occasioned the suit.

Adminis-  
tration ad  
litem.



Actions  
on behalf  
of estate.

**1243.** Persons who have possessed themselves of the property of the deceased, or debtors to the estate generally, cannot be made parties to an action against the executor, for regularly there can be no suit against the debtor, but by the executor who has the right both at law and in equity. If he even release and is solvent neither a creditor nor a residuary legatee can bring a bill against that debtor.

*Stanton v. Carron Co.* 11 Beav. 146.

Collusion.

**1244.** The Court will interfere if there is some special cause, as collusion or insolvency; then the action may be brought against the debtor and the executor. In the case of surviving partners of the deceased they may be made parties with the executor.

*Saunders v. Druce*, 3 Drewr. 140.

Cestuis  
que trust  
when  
necessary.

**1245.** Although one of two executors or trustees may sue the other executor or trustee without making the cestuis que trust parties to the suit, yet where cestuis que trust have participated in the breach of they are necessary parties.

*Jesse v. Bennett*, 6 De G. M. & G. 600.

Equity  
bound by  
statute of  
limitations.

**1246.** Although suits in Equity are not within the words of the Statute of Limitations, 21 Jas. I., c. 16, yet they are within the spirit and meaning of it, and, therefore upon all legal demands Courts of Equity were bound to yield obedience to its provisions.

*Flood v. Patterson*, 29 Beav. 203.

Effect of  
trust or  
charge on  
real estate.

**1247.** Generally speaking, the Statute of Limitations did not run against the trust; accordingly a trust or charge created by will upon the real estate for the payment of debts prevented the statute from running against such debts as were not barred in the testator's lifetime, though such a trust did not revive a debt on which the statute had taken effect before the will came into operation, namely, before the testator's death.

*O'Connor v. Haslem*, 5 H. of L. C. 170.

**1248.** But a trust or charge by will on the personal estate did not at all prevent the operation of the statute, for the law vested the personal estate of the deceased in his executors or administrators as a fund for the payment of his debts, and he could not by his will create a special trust for that purpose, and consequently such a trust had no legal operation.

*Evans v. Trecedy*, 1 Beav. 55.

**1249.** In a case where the statute was pleaded in bar to a legacy, demanded due 20 years before Lord Nottingham held that the legacy was not barred by the statute, nor ever had been so; though before the Limitations of Actions Act no statute could be pleaded to a legacy, yet presumption of payment from permitting the assets to be distributed without claiming the legacy was a good ground of defence by way of answer. Although, generally speaking, long lapse of time might lead to the presumption of payment, yet that presumption was liable to be rebutted by circumstances.

*Runcroft v. Frisby*, 1 Coll. 16, 23.

**1250.** In a suit against an executor or administrator, other than a suit for a general administration of the assets, the liability to costs will, generally speaking, be governed by the ordinary rule which throws them on the unsuccessful party. Accordingly, if the executor or administrator is sued in Equity by a creditor for the debt of a deceased, and the creditor succeeds in establishing his demands, the Court will direct the payment of the amount due to the creditor together with his costs out of the assets. The executor, however, will not be decreed to pay the costs if the assets are insufficient to pay both debt and costs.

**1251.** Where a suit is instituted either by creditors or residuary legatees for a general administration of assets, so that the whole estate of the deceased is necessarily taken from the hands of the personal representative and distributed under the direction of the

On personal estate.

Presumption of payment.

Liability for costs of administration.

Costs as between solicitor and client.

Court, his costs of suit as between solicitor and client are, generally speaking, provided for. Even where the assets are insufficient to pay the creditors of the deceased, these costs continue the first charge on the estate. But even if the suit was occasioned by the ignorance or unreasonable caution, or by the misbehaviour or the negligence of the executor or administrator, his costs of the suit, or of so much of the suit as was occasioned by such miscarriage, will not be allowed; whilst in cases marked by fraud, evasion or neglect of duty, the Court will not merely refuse to allow the executor his costs out of the assets, but will order him to pay the costs of the suit, or of so much of the suit as is attributable to the breach of duty on his part.

*Williams*, p. 2043.

Cases as to costs. See also paragraph 1167

**1252.** In addition to the authorities already cited paragraph 1167 the following will be found useful:

Reckless proceedings.

*Re Woodhall*, 2 O. R. 456.

Allowances for litigation.

*Hill v. Hill*, 6 O. R. 244.

Just allowances.

*In re Williams*, 22 A. R. 196.

*McDonald v. Davidson*, 6 A. R. 320.

Where executors, in good faith, unsuccessfully defended a suit on a note given by their testator, the Court, in pronouncing a decree against them, declared them entitled to deduct their costs as between solicitor and client, out of their testator's estate.

*McKellar v. Prangley, et al.*, 25 Chy. 545.

Administration suit.

*Re Cannon, Oates v. Cannon*, 13 O. R. 70.

Action by administrator for claim due deceased.

*Creve-Read v. Cape Breton*, 14 S. C. R. at page 14.

Costs of plaintiff.

**1253.** After the costs of the executor or administrator are satisfied, the next claim on the fund is that of the plaintiff in the suit for his costs incurred in it.

*Thompson v. Clive*, 11 Beav. 475.

**1254.** The principle in creditors' suits is that where the suit is properly instituted, and the fund to be administered is insufficient to pay the plaintiff his costs, those who have come in and received a benefit under the decree must contribute to make good that loss which the plaintiff has made good on behalf of all the creditors. One consequence of this right of the plaintiff to his costs appears to be that if the executor or administrator after judgment makes payment of a debt with a view to be reimbursed out of the fund in Court, his right to be reimbursed must be postponed to the payment of the plaintiff's costs, that is, he must run the risk of the funds not being sufficient to pay the costs and also to reimburse him.

*Jackson v. Woolley*, 12 Sim. 16, 17.

**1255.** A creditor coming in and establishing his debt is entitled to such costs as shall be fixed by the Court.

**1256.** Next of kin, who are not parties, are allowed the same costs as if the plaintiffs had brought them regularly before the Court as parties; therefore, if they would, as parties, have been entitled to their costs of proceedings in the Master's office for the purpose of making out their claim and their costs of appearing on further directions, but not otherwise, they shall also be allowed these costs on taxation.

*Penton v. Wells*, 7 C. D. 35.

**1257.** In a creditor's suit, if it turns out that there are no assets applicable to the plaintiff's debt, the plaintiff will be ordered to pay the costs.

*Fuller v. Green*, 24 Beav. 217.

**1258.** The Court will, immediately upon admission of assets by an executor or administrator, order so much as he admits to have in his hands to be paid into Court, though it was formerly thought necessary for the plaintiff to show that the executor or administrator had

abused his trust, or that the fund was in danger from his insolvent circumstances.

*Blake v. Blake*, 2 Scho. & Lef. 26.

Admission.

**1259.** The Court, in making an order of this kind, adheres strictly to the rule of acting on the admission only, and will refuse to proceed upon its knowledge derived from any other source.

*Scott v. Wheeler*, 12 Beav. 366.

**1260.** Money admitted by the executor to be in the hands of his partner, is in his own hands for the purpose of being ordered to be paid into Court.

Credits allowed.

**1261.** Where the executor admits that a certain amount of assets has come to his possession, he may discharge himself from the payment of it into Court wholly or partially, by taking credit for sums which he shows a right to retain for his own debt due from the testator, or to have allowed him on any just grounds, or which are undisputed.

*Nokes v. Seppings*, 2 Phill. 19.

Retainer of funds.

**1262.** The executors retained in their hands a sum of \$1,100 to meet claims against the estate, and were not called upon to pay it into Court:—Held, that the amount retained was not unreasonable, and that the executors were not chargeable with interest in respect of it.

*Thompson v. Fairbairn*, 11 P. R. 333.

Verification of payments.

**1263.** Where an executor admits that he has received a certain sum belonging to the testator's estate, but adds that he has made payments, the amount of which he does not specify, the Court will allow him to verify the amount of his payments by affidavit, and order him, on motion, to pay the balance into Court. But when there is a sufficient admission by the executor of assets once come to his hands, he cannot relieve himself from paying them into Court by showing any unauthorized application of them, or any investment or dis-

position of them which in substance amounts to a breach of his duty as executor.

*Lord v. Purchase*, 17 Beav. 171.

**1264.** If there is no danger of the property being lost from the executor being insolvent or otherwise, a reasonable time will be allowed for bringing funds into Court, a longer time being allowed when the money is in a foreign country; and if the assets appear to have been invested on an improper security, time will be allowed which may, in a proper case, be extended from time to time to enable the executor to realize the security.

*Score v. Ford*, 7 Beav. 333.

**1265.** In fixing the day for payment time will be allowed for the trustee, if he desires it, to show that no reason exists for calling the money into Court. The relief of a motion of this kind will be confined to the payment of money into Court. The plaintiffs must be solely entitled or have some interest jointly with others as to entitle them on behalf of themselves and of those others to have the fund secured.

*Score v. Ford*, ut sup.

**1266.** An executor having been ordered to pay money into Court is not thereby deprived of his lien on the fund for his costs.

*Blenkinsop v. Foster*, 3 Y. & Coll. 207.

**1267.** The general rule as to papers and writings is that an executor representing an estate should deposit them for the benefit of the parties interested in the office of the Clerk of Records and Writs, unless there are other purposes which require that he should retain them in his own hands.

*Freeman v. Fairlie*, 3 Meriv. 30.

**1268.** It is the bounden duty of an executor to keep clear and distinct accounts of the property which he is bound to administer. If, therefore, he chose to mix the

accounts with those of his own trading concerns, he cannot thereby protect himself from producing the original books in which any part of these accounts may be inserted.

Accounts, estoppel by rendering.

*Taylor v. Magrath*, 10 O. R. 639.

*McGregor v. Gaulin*, 4 U. C. R. 378, considered and distinguished.

Loan of funds to firm.

**1269.** As between an executor bound to produce and his partners in trade, if the partners have permitted him to mix the accounts, they cannot afterwards object to the production.

**1270.** In a case where the executor has admitted having lent to the House part of the trust property, and that they have been dealing with it, there is no doubt that production can be enforced.

Immediate judgment.

**1271.** If a plaintiff's demand be uncontested or proved, and the executor admits assets, the plaintiff is entitled to immediate payment without taking the accounts.

*Woodgate v. Field*, 2 Hare, 211.

Admission of assets cannot be retracted.

**1272.** An admission of assets for the payment of a legacy is an admission of assets for the purpose of the suit, and extends to costs if the Court thinks fit to give them.

*Heves v. Heves*, 4 Sim. 1.

Conversion of estate of executor.

**1273.** If it is charged that the executor has rendered himself personally liable to pay the plaintiff's debt or legacy by an admission of assets made before suit, or by any other means, and the plea can sustain this allegation, he will entitle himself to a decree for payment at once. An admission of assets by an executor or administrator can never be retracted in a Court of Equity, unless a case of mistake be most clearly established.

*Roberts v. Roberts*, cited 1 Bro. C. C. 487.

**1274.** If an executor changes the nature of the testator's estate, the general rule is that this is a conversion, and as money has no earmark it cannot be followed; but the executor by such transaction has made himself liable to a devastavit for which the party injured must seek satisfaction out of the executor's own effects. But if an executor for the benefit of a testator's estate, invests part of it in the funds, or transfers money from one stock to another, this is not a conversion, but it may still be followed as much as if it had continued in the same condition as at the testator's death.

*Watte v. Whorwood*, 2 Atk. 159.

**1275.** In case of an executor committing a devastavit, and a decree for payment of the amount, the debt is considered as due from the time of the devastavit, and not from the date of the decree.

**1276.** In framing an order under Con. Rule 198 appointing an administrator ad litem, it is not sufficient that the order state "it is ordered that A. be and he is hereby appointed administrator ad litem to the estate of B."; the order is really a grant of administration, and should contain the particulars mentioned in rule 48 of the Surrogate rules; and if such is the fact, should also, in view of R. S. O. (1897) c. 59, s. 67, state that the administration is of the real and personal estate.

*Cameron v. Phillips*, 13 P. R. 141.

**1277.** A. makes a note payable to B. or order; B. endorses to C., who endorses to D.; D., the holder, dies, leaving B. one of the executors. The executors of D. sue C. Held, that D., having made B. his executor, B. was discharged, and that there was no remedy against the subsequent endorser.

*Jenkins v. McKenzie*, 6 U. C. R. 544.

**1278.** Section 10 of the Evidence Act (R. S. O. 1897, c. 73), provides as follows:—

10. In any action or proceeding by or against the heirs, executors, administrators, or assigns of a deceased person, an opposite a deceased



person, the evidence of the opposite party must be corroborated.

or interested party to the action shall not obtain a verdict, judgment, or decision therein, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence. R. S. O., 1887, c. 61, s. 10.

*Rudford v. Macdonald*, 18 A. R. 167.

*Green v. McLeod*, 23 A. R. 676.

*Re Staebler*, 21 A. R. 266.

Effect of judgment against executors.

**1279.** A judgment against executors is only prima facie evidence of its being for a debt due by the testator, and the parties interested in the real estate are at liberty to disprove it.

In an action by a judgment creditor on a judgment recovered on a promissory note discounted by him, which note was received by the executors for the sale of personal property of the testator, and indorsed "without recourse" to the plaintiff.

Held, that the indorsement of the note by the executors would not make it a debt of the testator in the hands of the indorsee.

Held, also, that the effect of the Devolution of Estates Act and amendments, acted upon by the registration of a caution under the sanction of a County Court Judge, after the twelve months had expired, was to place lands of a testator again under the power of his executors so that they could sell them to satisfy debts; and that the expression "in the hands" of executors, as applied to property of the testator, is satisfied if it is under their control or saleable at their instance; and that the operation of a devise of lands is only postponed for the purposes of administration, and the estate does not pass through the medium of the executors, but by the operation of the devise.

*Janson v. Clyde*, 31 O. R. 579.

Judgment against executors, effect of.

*Re Hague, Traders Bank v. Murray*, 13 O. R. 727.

**1280.** In a mortgage action for foreclosure, although it may be that since the Devolution of Estates Act, as a matter of title, the record is complete with the general administrator of the deceased owner of the equity of redemption as the sole defendant; yet, as a matter of procedure, the infant children of the deceased are proper parties, and as such should appear as original defendants, unless some good reason exists for excluding them.

*Keen v. Codd*, 14 P. R. 15.

**1281.** A mortgage action against the surviving husband and infant children of the mortgagor, who died intestate in February, 1892, was begun before the lapse of a year from the death:—

Held, that the plaintiff was entitled after the lapse of a year, to judgment for the enforcement of her mortgage, without having a personal representative of the mortgagor before the Court, no administrator having been appointed and no caution registered under the Devolution of Estates Act.

*Ramus v. Dow*, 15 P. R. 219.

Recovery against representatives of person charged with fraud.

*Hamilton Prov. v. Cornell*, 4 O. R. 623.

Action to set aside will—costs of next of kin intervening. See paragraph 66.

*Logan v. Herring*, 19 P. R. 168.

EXTRACTS FROM

## A LECTURE ON EXECUTORSHIP ACCOUNTS

BY

MR. HARRY VIGEON, F.C.A.

*President of the Institute of Chartered Accountants.*

I will assume for my purpose this evening, that probate has been granted before the accountant has been called in.

It will be found, perhaps, that few books have been kept by the executors—possibly only a cash book—showing actual receipts and payments—so as to have some record of the transactions; but no ledger containing an account of the estate, which they (the executors) have to deal with, or in which the entries from the cash book have been classified, so as to show the necessary particulars required to make up the residue account; and also bank pass book, cheque book, and a batch of papers and receipts amongst which will doubtless be found a solicitor's bill. The latter is usually one of the most useful documents in the parcel, as a perusal of it will invariably give you a history of the transactions of the trust, and throw much light on entries and matters which you will presently have to deal with.

Then comes the question, what books are necessary to be kept, so as to show a clear and concise account of the estate which has come into the hands of the executors, and the manner in which it has been dealt with; and what is the best method to adopt so as to present it in a clear, pithy and simple form, at once to meet the requirements of the residuary account, and be such that executors—who are not professional accountants—may be able to refer to and understand for themselves, without having to ask constantly for explanations.

It seems to me that this is what is required, and the simpler the accounts are kept the better, whether we are dealing with trust or any other accounts, provided they contain all that is necessary to attain the object for which they are designed.

The books required are two in number, cash book and ledger, both combining the journal features of full details.

The advantage of dispensing with a journal is that it is particularly desirable, in these accounts, that the ledger should contain the fullest particulars of all the entries, so that the effect of the various transactions may readily be traced, without having recourse to any other book.

It is an advantage to be able to see in the most concise form possible all the transactions of the estate, and if the ledger and the cash book can be made to show, with a little extra detail, the particulars usually given in the journal, I think it advisable. It saves at least one book of reference, and gives every particular required without having to be constantly turning to the journal.

In some cases the word journal would fully describe the first of these, although it will be found convenient to keep it in the form of a cash book, as executors rarely keep cash in hand if they are wise, most of their receipts being paid direct into the bank, and most of their payments being made by cheque, which means crediting the account on which the receipt is derived and debiting the bank, or debiting the account on which the payment is made, and crediting the bank, as the case may be.

In the first place it will be found convenient to raise the accounts in draft, as in the process of your work you are sure to meet with items requiring explanation before you can decide to what account they should be placed, or what proportion may be capital or what income; and if you do not find it necessary, as you proceed, to make alterations and corrections in entries which you may have already made, you will indeed be fortunate in having a trust committed to your care, in which the information in your possession is unusually complete and straightforward. For this purpose two ordinary cheap books, with card or paper backs—both ruled alike, namely, in the form of an ordinary cash book, with double cash columns—will be found most convenient, one for the cash book, and the other for the ledger. This form will be found very suitable for the ledger, as it will afford you ample room to detail full descriptive particulars of the entries, which in trust books is indispensable, as well as separate cash columns for income and capital. The latter, in the case of investments and personal accounts of settled legacies, enables the capital and income to be dealt with separately in one account, and so obviates the necessity of having two accounts, and secures the convenience of having the whole matter, in respect of an investment or settled legacy, before you at one opening.

Having obtained these books, you will find it of great service and a saving of much time and trouble afterwards if you carefully peruse the will, and enter a short abstract of its provisions and dispositions on the fly leaf of one of them, in addition to such particulars as the date of the will, date of death, date of grant of pro-

bate, at what amount sworn, the names and addresses of the executors and trustees; and where there are legatees, under age—not coming into the full benefit of their legacies until they have attained their majority—the dates of their respective births, so that in case of a long trust, in which in all probability you will be entrusted with an annual audit of the accounts, you may not lose sight of these matters, but have all the information required readily at hand, without time after time having to wade through the legal phraseology of these somewhat lengthy documents, which must of necessity be the case where some course of this description is not adopted, as no professional man, in the multiplicity of business which passes through his hands, can reasonably expect to commit to memory from year to year the variety of provisions contained in all the wills regulating his trusts.

When you have done this, and carefully read through the batch of papers to which I have alluded, you will find yourself tolerably well acquainted with the leading points of the matter in hand, have a very fair idea of the framework of your task, and be ready to commence raising the necessary entries for the basis of your accounts.

You first ascertain if the various items of the estate returned in the form for probate are accurate, and in case any difference should arise in consequence of information which lapse of time may have revealed, or from any other cause, you make a note of it.

You then commence your cash book and ledger with entries of the personal estate, first crediting capital, and debiting the various accounts of which it is composed in such order as you propose to open them in the ledger, capital account being the first.

When the ledger entries, setting forth the personal estate have been made, and posted to the respective accounts in the order referred to, you will then have got a fair start, and the capital account will show the total personal estate of which the testator died possessed. If this agrees with the amount sworn to for probate, or at any rate does not exceed it to such an extent as to render the executors liable to payment for further duty, well; but if, on the contrary, it exceeds the amount so much as to show that insufficient duty has been paid, you should at once communicate with your client, in order that he may give you definite instruction thereon.

Having so far proceeded, it is then necessary to complete the capital account by making the entries through the ledger of real estate, and any other estate not included in the above.

Here it may be pointed out that by recent enactments of the legislature the executors or trustees are required to deal with the whole of the estate, whether real or personal. A separate account should be opened with each parcel of real estate, and on the opposite folio an account of the encumbrance (if any) existing against it.

The whole transaction relating to that particular item of capital can then be seen at a glance, *i. e.*, the parcel of real estate; the encumbrance on same; the revenue derivable from the rental, lease or use of the property; the cost of carrying the mortgage.

And although the real estate may be specifically devised, it is always well to pass it through the books by debiting real estate and crediting capital, and when you appropriate the estate, debit capital and credit the devisee by a transfer from real estate account, which will close the transaction. By adopting this course the books will show the disposition of the whole estate of which the testator died possessed, whether personal or real.

I now assume that the whole estate, real and personal, of which the testator died possessed, has been entered with full descriptive particulars in the cash book and ledger, and that the values inserted are either the amounts actually realized or vouched by valuations, and certificates of competent authorities; that the entries have been duly classified and posted to accounts opened in the ledger with each investment in the order I have indicated, and that all the entries of capital, as distinct from income, have been entered in the outer or capital column in the ledger, and those of income in the inner or income column. I assume that the date which has been affixed to these entries is the date of the death, and that all rents and income due and accrued at death have been apportioned, as if accruing from day to day, and treated as part of the capital estate, in accordance with the law; and that the books now contain an account of the whole of the assets of the testator, and show exactly the estate which the executors have to deal with.

The next thing to be proceeded with is the dealing with the estate, which, of course, comprises the transactions of the executors, and as it consists entirely of receipts and payments, it will appear in the form of a cash account, the entries being made in the order of date in which the transactions are effected.

The first entry will be the cash in the house, brought from the previous ledger entries, then following, on the debit or receipt side, will come sums received in payment of book debts, proceeds of shares and other investments realized, also rents, dividends, interest, etc., received, which are income and cheques drawn on the bank, which in reality are receipts from the bank, of moneys drawn out to discharge payments, and will be balanced by corresponding entries on the credit or payment side. On the credit side will appear all payments and disbursements made by the executors in discharge of debts due by deceased funeral and testamentary expenses, duties and payments into bank, etc.

Vouchers should be produced for all these payments, and where they contain items incurred previous to death, as well as those in-

curred subsequently, such items should be carefully separated and classified, so as to insure their ultimate entry in the right account.

The payments will be found to comprise :

1. Probate and administration, which includes fees payable on the grant of probate.

2. Funeral expenses, which includes coffin, hearse and carriages, interment fees, gravestone and monument, family mourning, etc.

3. Executorship expenses, including valuation fees, law costs, accountants charges, travelling expenses, cheque books and the numerous expenses incident to the execution of the trusts.

4. Debts on simple contract, comprising debts owing by the testator, rent, taxes, wages, etc.

5. Debts on mortgages (if any) with interest due at death.

6. Debts on bonds and other securities, etc.

7. Pecuniary legacies.

Accounts should be opened in the ledger under these headings, following those already opened, and the various payments previously and correctly classified in the cash book, duly posted to them respectively.

In posting the various entries from the cash book to the ledger, I would here observe that care must be taken to post all sums received on account of income, such as dividends on shares, interest on mortgages, rents on properties, etc., to the respective accounts opened with these investments in the ledger, in the inner or income column, as well as all payments for repairs, insurance, etc., that may be made on account of the properties, which, with very few exceptions, are chargeable against income.

It will now be necessary to make closing entries, transferring the several accounts under the head of payments, already referred to, viz., probate duty, funeral expenses, executorship expenses, debts, etc., etc., to the debit of capital account. It will also be necessary to transfer to the debit of this account any deficiency that may have arisen in the realization of investments, etc., or property previously taken at valuations, as well as to place to the credit of the same account any excess that may have been realized over and above such valuation.

When all these entries have been made a balance should be struck and brought down, which, in the event of all the debts having been paid, liabilities discharged or provided for, and assets realized, will be the net amount of estate applicable to legacies and bequests. In the cases where there is still a portion of the estate unrealized and debts outstanding, a reserve should be made, equal to the amount at which such items have been valued in the accounts, and may be carried forward as a balance only to be divided

when realized. In the event also of an annuity for life being bequeathed, either a sum should be separately invested to produce the amount of such annuity, or if paid out of the income of the estate a sufficient portion of the capital should be reserved out of the residue to cover it before division. Matters of this description, and any special matter of the nature of a contingent liability which often happens, having been duly provided for, so as to protect the executors from parting with any estate not absolutely ascertained by realization, you may proceed to apply the balance as directed by the Will.

First will come pecuniary legacies, if any, for which any entry should be made through the ledger, debiting capital, and crediting legatee in a separate account, which account or accounts, will be closed when the actual payments are made, by posting the cash to the debit.

When the pecuniary and specific bequests have been duly provided for the balance will be the residue of capital.

It now remains to close those accounts relating to income, which are the sums placed to the credit of the various investments for dividends, interest, rents, etc., less the proportion accrued at death, which has been already posted to the debit in the first entries made in the ledger of testator's estate at death.

The balance is transferred by debiting these accounts respectively, and crediting income account.

The books now contain in a concise form all the information requisite to complete the residuary account, and the schedules required to accompany it, and it will be well to make out a statement of affairs showing such particulars along with the schedules as will enable the beneficiaries to clearly understand the disposition of the estate thus far.

It will be necessary to shew what property has been converted into money, and the date of such conversion, as separate columns are provided for money received and property converted into money, and for the value of property not converted into money. In the latter case the value of the property at the time the account is rendered is required, and inventories and proper valuations must be produced, so that care must be taken to ascertain whether any variation has arisen since the accounts were opened, and to adjust them accordingly. The shares not converted into money are to be valued at the average price of the day on which the account is dated, and if there be shares in many companies, it may be convenient to insert the total amount or value in this account, and annex a schedule of the particular shares. When the various amounts are entered in the account under the respective headings therein required, the total of the first column, in which all property converted into money has been entered, is carried out into column No. 2 and cast up with it, the total being the total property.



We now come to the deductions for payments, which include probate duty, funeral expenses, executorship expenses, debts under three distinct headings, viz., simple contract debts, mortgage ditto, and those on bonds and other securities, and then pecuniary legacies. A schedule of the debts signed by the executor or administrator is to be annexed, and the particulars of any other lawful payments, and of the funds and other securities purchased and inserted, with the date of such purchase. These deductions are entered in an inner column and the total carried out, and deducted from the total property, leaving the net amount of property to be carried forward to the next page of the account, in which must be inserted and added the accumulations of interest, dividends, rents, etc., from the date of death to date of account, classified in the manner therein described. From this total should be deducted payments out of interest on mortgages, bonds, legacies, etc., payment on account of annuities and other payments (if any), comprising expenses incurred in the management of the trust estate, and chargeable against income, and a balance again shown. Then any deduction from residue should be taken, including debts still due from the estate (if any) and money retained to pay outstanding legacies.

When the account has been carefully drawn in the manner described a balance will be the net residue.

The illustration herewith given is an estate simple in its workings, and of small value, but the principles before described are therein set out in account form.

The opening account in the ledger is the estate capital account, and its credits are all the property of which the testator died possessed, treated at its ascertained value, and including the income or revenue accrued on investments made up to the date of the testator's death.

The total of these credits forms the corpus of the estate. Separate ledger accounts are opened with each investment, also an income (perhaps a bank account), and a personal account with each beneficiary.

These separate accounts will give in full detail the particulars of each asset.

When the whole of the funeral and testamentary expenses have been paid, and the debts of the deceased and executorship expenses settled these accounts will be closed by transferring the totals to the debit of the estate's capital account.

After the efflux of time as settled by the will, and the legacies have been paid, the residuary legacies will be apportioned to those entitled to a share according to their several proportions.

The accountant or executor should be careful to reserve sufficient to pay costs of distribution and any shortages in annuities before closing the estate among the residuary legatees.

## DEBTS OF DECEASED OR TESTATOR.

**MEMO.** Though including such sums as would have been legally demandable from the testator had he lived, still it is well to remember that subscriptions to charitable and religious objects do not come under this head.

Funeral expenses must be only such as are reasonable, according to deceased's station in life, and do not warrant the cost of mourning for relatives or servants, or of anything in the shape of an elaborate monument.

Remember at all times the danger from residuary legatees.

The executor should not pay household expenses for any longer period than is absolutely necessary to enable the survivors of the family to make arrangements to carry on for themselves.

**NOTE.** Take care of the capital and let the income take care of itself, and if in any matter like apportionment you set so as to give capital the benefit, you will at any rate be on the safe side, for, remember that the greatest difficulty is experienced in recovering money one has paid by way of income to the life tenant.

Pay all legacies as soon as the state of the capital account permits.

It is not necessary, often it is unadvisable, to put a value in the books upon any asset not actually turned into money.

**CODICIL.** A codicil is an additional will, in no way revoking the will of which it is an addendum, but varying its provisions by way of making changes. Should the codicil give a legacy to one who is mentioned in the will, then, unless specifically stated as being an addition to the former bequest, then a question arises as to its being "in addition to" or "instead of" the legacy in the will.

## NOTES FOR STUDENTS.

A very frequent error is to charge executors' expenses to income account. This is wrong, such expenses may be carried to income as have been actually incurred on account of income.

The object sought in obtaining probate of the will is that the executor may have a complete and legal title conferred upon him to collect, get, realize, or deal with the property of the deceased in accordance with the provisions of the will.

Regarding the payment of interest on legacies, the executor may pay the legacy within twelve months of the death of the deceased, but is not compelled to do so. He is not to pay interest for any time within the twelve months, although during that time he may have received interest. But if he has assets he is to pay interest from the end of the twelve months, whether the assets have been productive or not.

The aim of my paper is to impress the general form of trust accounts on students of accounts, the details of heavier trusts will follow in every case the lines before outlined.

Work up your draft accounts upon loose sheets of foolscap properly paged.

An accrued rent or a dividend is as much an asset as a trade book debt, and should be brought into account in the same way as in commercial accounts.

Ledger accounts ruled with two money columns, one for principal, the other for income items, are useful when taking off statements.

The gift of an annuity out of the general estate, or out of a particular fund, creates a charge on the corpus, and all payments of the annuity must be satisfied in full before anything can go over.

In the case of bank stocks, the market quotation for the same as given out by the Stock Exchange, is made up of the market price of the shares, plus the accrued interest to the date of quotation. So that when making up the corpus of an estate, among the items of which are bank stock, you must remember that the accrued interest on such shares is already included in the quoted market price.

This does not apply to debentures.

## SPECIMEN ACCOUNTS OF AN ESTATE.

*Re* WILLIAM CHILD, DECEASED.

### SUMMARY.

Testator William Child died 19th March, 1896.

Will dated 17th March, 1896.

Estate left in trust to his executors to pay therefrom his debts, funeral and testamentary expenses and legacies to beneficiaries mentioned in his will.

Directs a payment of \$10,000 to his widow, Lucy Child.

Bequeaths the household furniture, stable and house to his widow absolutely.

Directs the balance of his estate to be invested in specified securities, and the income derivable therefrom to be divided equally between his wife and two sons.

Directs that on the death of his widow the investments are to be realized and the amount divided equally between his surviving children.

The widow survived her husband one year.

The trustees left investments as they received them.

In this case no duties were payable under Succession Duties Act.

### SCHEDULE OF CORPUS, 19th MARCH, 1896.

Cash in house .....	\$115 00
Cash in bank .....	24,800 00
House, furniture and other contents, stable; specifically bequeathed to widow; valued for probate .....	20,000 00
Sundry debtors .....	800 00
Accrued interest on G.T.R. debentures .....	250 00
Accrued interest on Imperial Bank stock, say.....	720 00
Mortgage of John Jones .....	4,000 00
Accrued interest on same .....	60 00
Promissory note William Smith .....	1,250 00
Accrued interest on same .....	15 00
Life Assurance Policy .....	10,000 00
G. T. R. debentures .....	11,500 00
Imperial Bank stock .....	16,000 00

## 1. DR.

## ESTATE CAPITAL ACCOUNT.

1896.			\$	c.
April 30..	To Funeral Expenses, transfer.....	Fo. 11	300	00
" "	" Sundry Debts, " .....	" 12	1,500	00
July 31..	" Legacies, " .....	" 13	10 000	00
" "	" Special Bequests " .....	" 13	20,000	00
1897.				
April 14..	" Executorship Expenses .....	" 14	500	00
" "	" Testamentary " .....	" 11	300	00
" "	" John Child, half share residue .....	" 19	28,970	00
" "	" Wm. Child, " " .....	" 20	28,970	00
			90,540	00

## 3. DR.

## CASH.

## CASH

		FOLIO.	CAPITAL.	INCOME.	BANK.
1896.			\$ c.	\$ c.	\$ c.
Mar. 19	To Cash in house at death .....	1	115 00	....	115 00
" "	" Cash in Bank at death .....	1	24,800 00	....	24,800 00
May 31	" John Jones, interest .....	8	60 00	40 00	100 00
June 5	" Debts, W. Speight .....	5	250 00	....	....
" 5	" " S. Cartright .....	5	300 00	....	550 00
July 3	" " J. Smith .....	5	50 00	....	50 00
" 3	" " Imperial Bank .....	7	720 00	80 00	800 00
" 8	" Canada Life Assurance Co. ....	10	10,000 00	....	10,000 00
" 13	" William Smith, loan .....	9	1,250 00	....	1,250 00
" 13	" William Smith, interest .....	9	45 00	16 00	61 00
" 31	" L. Moore, debt .....	5	100 00	....	100 00
Aug. 9	" Geo. May, debt .....	5	100 00	....	100 00
" 31	" G. T. R. debentures .....	6	250 00	500 00	750 00
Nov. 30	" John Jones, interest .....	8	....	100 00	100 00
1897.					
Jan. 1	" Imperial Bank, dividend .....	7	....	400 00	400 00
Mar. 1	" G. T. R., dividend .....	6	....	750 00	750 00
			38,040 00	1,886 00	39,926 0
1897.					
Mar. 19	To balance brought down .....		25,440 00	386 00	25,826 00
April 14	" Proceeds from sale of Imperial Bank stock .....	7	16,000 00	....	16,000 00
" "	" Proceeds from sale of G. T. R. debentures .....	6	12,500 00	....	12,500 00
" "	" John Jones, interest to date ..	8	....	51 00	51 00
			53,940 00	437 00	54,377 00

## ESTATE CAPITAL ACCOUNT.

Cr. 1.

\$ c.	1896.			\$ c.
300 00	Mar. 19..	By Cash in house at death.....	Fo. 3	115 00
1,500 00		" Imperial Bank on current account.....	" 3	24,500 00
10 000 00		" Special Bequest to Widow; House, Furni- ture, Stable.....	" 4	20,000 00
20,000 00		Debts due to testator:		
		William Speight .....	\$250 00	
500 00		" L. Moore.....	100 00	
300 00		" Samuel Cartright.....	300 00	
28,970 00		" Joseph Smith.....	50 00	
28,970 00		" George May .....	100 00	
		" Accrued interest, G. T. R. Debentures..	" 5	800 00
		" " Bank Stock.....	" 6	250 00
		" Mortgage, John Jones .....	" 7	720 00
		" Accrued interest on same.....	" 8	4,000 00
		" Promissory note, William Smith .....	" 8	60 00
		" Accrued interest on same.....	" 9	1,250 00
		" Life Assurance Policy .....	" 9	45 00
	1897.	" Debentures, G. T. R .....	" 10	10,000 00
	April 14..	" Imperial Bank Stock.....	" 6	12,500 00
			" 7	16,000 00
				90,540 00

90,540 00

## ACCOUNT.

## CONTRA.

Cr. 3.

BANK.		FOLIO.	CAPITAL.	INCOME.	BANK.
\$ c.	1896.		\$ c.	\$ c.	\$ c.
115 00	April 22	By Testamentary Expenses—Pro- bate, etc .....	11	300 00	300 00
24,800 00		" Funeral Expenses, Bury & Co. ....	11	100 00	100 00
100 00		" " .....	11	200 00	200 00
550 00	May 9	" Debts of S. Wren .....	12	1,000 00	1,000 00
50 00	" 23	" " T. Brown .....	12	500 00	500 00
800 00	July 31	" Legacies, Widow of testator ..	13	10,000 00	10,000 00
10,000 00	Aug. 8	" Executorship Expenses, Solici- tor and Accountant's fees. ..	14	500 00	500 00
1,250 00	Dec. 10	" Lucy Child on account income	15	500 00	500 00
61 00	" 10	" John Child .....	16	500 00	500 00
100 00	" 10	" William Child .....	17	500 00	500 00
100 00				12,600 00	14,100 00
750 00	1897.				
100 00	Mar. 19	" Balance carried down.....		25,440 00	386 00
					25,826 00
				38,040 00	1,886 00
					39,926 00
	1897.				
	Mar. 20	By Lucy Child, balance income ..	15	128 67	128 67
	" 20	" John Child .....	16	128 67	128 67
	" 20	" William Child .....	17	128 67	128 67
25,826 00	April 14	" Exe'trs Lucy Child, $\frac{1}{3}$ of income	15	17 00	17 00
	" 14	" John Child .....	16	17 00	17 00
16,000 00	" 14	" William Child .....	17	17 00	17 00
	" 14	" John Child, balance of share of residue.....	19	24,970 00	24,970 00
12,500 00	" 14	" William Child, share of residue	20	28,970 00	28,970 00
51 00				53,940 00	437 00
					54,377 00

54,377 00

DR.			Capital.	Income.
			\$ c.	\$ c.
1896.				
Mar. 19..	To Estate Capital Account--			
	Amount advance on Mortgage of Freehold house, 36 Chancery Lane, at 5% per annum.	Fo. 1	4,000 00	
" 19..	To Estate Capital Account--			
	Proportion of interest due on mortgage to date .....	" 1	60 00	
May 31..	To Income Account--			
	Balance of half year's interest..	" 18		40 00
Nov. 30..	To Income Account--half year's interest .....	" 18		100 00
1897.				
April 14..	To Income Account--Interest to date.....	" 18		51 00
			<u>4,060 00</u>	<u>191 00</u>

DR.			CAPITAL.	INCOME.
			\$ c.	\$ c.
	The Investment is \$12,500 6%			
	Debenture Stock.			
1896.				
Mar. 19..	To Estate Capital Account .....	Fo. 1	12,500 00	
" ....	" " proportion of half year's dividend to date	" 1	250 00	
Aug. 31..	To Income Account balance of $\frac{1}{2}$ year's interest on Debentures	" 18		500 00
April 14..	" Income Account $\frac{1}{2}$ year's interest	" 18		750 00
			<u>12,750 00</u>	<u>1,250 00</u>

ONES

ome.

\$ c.

40 00

100 00

51 00

191 00

RUNK

OME.

\$ c.

500 00

750 00

250 00

## MORTGAGE ACCOUNT.

8.

			Capital.	Income. Cr.
			\$ c.	\$ c.
1896.				
Mar. 31..	By Cash.....	Mo. 3	60 00	40 00
Nov. 31..	" " .....	" 3		100 00
1896.				
April 14..	" " .....	" 3		51 00
" 14..	" John Child, transfer of Mort- gage as per agreement in part payment of his share of Residue .....	" 9	4,000 00	
			<u>4,060 00</u>	<u>191 00</u>

## R. R. DEBENTURES.

6.

			CAPITAL.	INCOME. Cr.
			\$ c.	\$ c.
1896.				
Aug. 31..	By Cash.....	Mo. 3	250 00	500 00
1897.				
Mar. 1..	.....	" 3		750 00
April 14..	.....	" 3	12,500 00	
			<u>12,750 00</u>	<u>1,250 00</u>



Dr.		CAPITAL.		INCOME.	
		\$ c.		\$ c.	
1896.					
Mar. 19..	To Estate Capital Account—Loan on promissory note at 6% per annum .....	Fo. 1	1,250 00		
" 19..	To Estate Capital Account—Interest due on same to date.....	" 1	45 00		
July 13..	To Income Account balance of Interest to date.....	" 18			16 00
			<u>1,295 00</u>		<u>16 00</u>

## 7.

## IMPERIAL

Dr.		CAPITAL.		INCOME.	
		\$ c.		\$ c.	
1896.	The Investment is 80 Shares of Imperial Bank Stock				
Mar. 19..	To Capital Account.....	Fo. 1	16,000 00		
" 19..	To Estate Capital Account proportion of dividend to date ..	" 1	720 00		
June 30..	To Income Account balance of $\frac{1}{2}$ year's dividend on stock..	" 18			80 00
Jan. 1..	To Income Acct., $\frac{1}{2}$ year's interest	" 18			400 00
			<u>16,720 00</u>		<u>480 00</u>

## 18.

## INCOME

Dr.					
1896.					
Mar. 19..	To Lucy Child, Income Account, $\frac{1}{3}$ of income..	Fo. 15		\$ c.	628 67
" 19..	" John Child " " ..	" 16			628 67
" 19..	" William Child " " ..	" 17			628 66
					<u>1,886 00</u>
1897.					
April 14..	To Executors Lucy Child, Income Account to date.....	" 15			17 00
" 14..	" John Child, Income Account to date.....	" 16			17 00
" 14..	" William Child " " .....	" 17			17 00
					<u>51 00</u>

**E. C.**

9.

[illegible]

**C.**

7.

		CAPITAL.		INCOME. CR.	
1896.		\$	c.	\$	c.
June 30..	By Cash.....	For	3	720 00	80 00
1896.					
Jan. 1..	" .....	"	3		400 00
April 14..	" .....	"	3	16,000 00	
				16,720 00	480 00

ACCOUNT.

1x.

CR.

1896.			\$ c.
May 31..	By John Jones, Balance of half year's interest on loan, \$4,000.00 .....	Fo. 8	40 00
June 30 .	" Imperial Bank, Balance of half year's dividend on stock .....	" 7	80 00
July 13..	" William Smith, Balance of interest on loan on B. R. ....	" 9	16 00
Aug. 31..	" G. T. R., Balance of interest on debentures .....	" 3	500 00
Nov. 30..	" John Jones, half year's interest .....	" 8	100 00
	" Imperial Bank, " " .....	" 7	400 00
	" G. T. R., " " .....	" 6	750 00
			1,886 00
1897.			
April 14..	" John Jones, interest on mortgage to date. . .	" 3	51 00
			51 00

4. HOUSE FURNITURE, &c. Dr. Capital. Cr.

1896.				\$ c.	\$ c.
Mar. 19..	To Estate Capital Account as per Probate, etc .....	Fo. 1	20,000 00		
1896.					
Mar. 18..	By Legacies—for House, etc Specifically bequeathed..	" 18			20,000 00

10. CANADA LIFE ASSURANCE CO. Capital.

1896.				\$ c.	\$ c.
Mar. 19..	To Estate Capital Account—proceeds of policy on the life of testator .....	Fo. 1	10,000 00		
July 8..	By Cash—Amount of Policy paid.	" 3			10,000 00

12. SUNDRY CREDITORS.

1896.				Capital.	Income.
Mar. 19..	By Estate Capital Account .....	Fo. 1		\$ c.	\$ c.
					1,500 00
May 9..	To Cash S. Wren . .....	" 3	1,000 00		
" 23..	" T. Brown .....	" 3	500 00		

13. BEQUESTS AND LEGACIES.

1896.				Capital.	
Sep. 30..	To House, Furniture, Stable specifically bequeathed to widow ..	Fo. 4	20,000 00	\$ c.	\$ c.
1896.					
July 31..	To Lucy Child—widow .....	" 3	10,000 00		
	By Estate Capital Account transfer	" 1			30,000 00

14. EXECUTORSHIP EXPENSES.

1896.				\$ c.	\$ c.
Aug. 8..	To Cash, Lindley & Co., solicitors, and H. Quill, accountant. ....	Fo. 3	500 00		
1897.					
Mar. 19..	By Estate Capital Account .....	" 1			500 00

Cr.

5.

## SUNDRY DEBTORS.

Capital.

Dr. Cr.

			\$ c.	\$ c.
1896.				
Mar. 19..	To Estate Capital Account for Sundry debts owing to Testator at Death .....	Fo. 1		
	W. Speight .....	" 1	250 00	
	L. Moore .....	" 1	100 00	
	Samuel Cartright .....	" 1	300 00	
	I. Smith .....	" 1	50 00	
	George May .....	" 1	100 00	
June 5..	By Cash W. Speight .....	" 3		250 00
" 5..	" " S. Cartright .....	" 3		300 00
	" " I. Smith .....	" 3		50 00
July 31..	" " L. Moore .....	" 3		100 00
Aug. 9..	" " G. May .....	" 3		100 00
			800 00	800 00

11.

## TESTAMENTARY AND FUNERAL EXPENSES.

			\$ c.	\$ c.
1896.				
April 22..	To Cash Bigwig & Co. for Probate and Law expenses attending thereto .....	Fo. 3	300 00	
	To Cash Bury & Co .....	" 3	100 00	
	" " Spark & Son .....	" 3	200 00	
1897.				
Mar. 31..	By Estate Capital account transfer .....	" 1		300 00
	" " " " " " .....	" 1		300 00
			600 00	600 00

12.

## LUCY CHILD—INCOME ACCOUNT.

Dr.

Cr.

			\$ c.	\$ c.
1896.				
Dec. 10..	To cash on account of income ....	Fo. 3	500 00	
1897.				
Mar. 20..	" " balance of income .....	" 3	128 67	
	" " By Income Account, $\frac{1}{3}$ of income year ending this date .....	" 18		628 67
1897.				
April 14..	To Cash on account of Income ...	" 3	17 00	
	By Income Account per Executors $\frac{1}{3}$ of amount .....	" 18		17 00

16. JOHN CHILD—INCOME ACCOUNT.		Dr.	Cr.
1896.			\$ c.
Dec. 10..	To Cash on account of income ...	Fo. 3	500 00
1897.			
Mar. 20..	" " balance of income .....	" 3	128 67
" " ..	By Income Account, $\frac{1}{3}$ of income year ending this date.....	" 18	628 67
1897.			
April 14..	To Cash on account of income....	" 3	17 00
" " ..	By Income Account, $\frac{1}{3}$ of amount.	" 18	17 00

17. WILLIAM CHILD—INCOME ACCOUNT.			
1896.			\$ c.
Dec. 10..	To Cash on account of income....	Fo. 3	500 00
1897.			
Mar. 20..	" " balance of income .....	" 3	128 67
" " ..	By Income Account, $\frac{1}{3}$ of income year ending this date.....	" 18	628 67
1897.			
April 14..	To Cash on account of Income...	" 3	17 00
" " ..	By Income Account, $\frac{1}{3}$ of amount.	" 18	17 00

19. JOHN CHILD—(SHARE OF RESIDUE ACCOUNT.)			
1897.			\$ c.
April 14..	To John Jones (Mortgage Account) transfer as per agreement of \$4,000.00 Mortgage in part payment of share of Residue.	Fo. 8	4,000 00
April 14..	To Cash balance of Residue.....	" 3	24,970 00
	By Estate Capital Account, $\frac{1}{2}$ share of Residue at this date.	" 1	28,970 00
			28,970 00
			28,970 00

20. WILLIAM CHILD—(SHARE OF RESIDUE ACCOUNT.)			
1897.			\$ c.
April 14..	To Cash Share of Residue .....	Fo. 3	28,970 00
" 14..	By Estate Capital Account for $\frac{1}{2}$ share of Residue at this date.	" 1	28,970 00
			28,970 00
			28,970 00

Cr.  
\$ c.

028 67

17 00

\$ c.

028 67

17 00

\$ c.

## LIST OF APPENDICES.

1. Colonial Probate Act, p. 433.
2. Selected Rules of the Surrogate Court, p. 436.
3. Orders of Court relating to Trusts Corporations, p. 445.
4. Administration by Crown of Estates of Intestates, p. 446.
5. Mortmain and Charitable Uses Act, p. 450.
6. Distribution Sections of Devolution of Estates Act, p. 452.
7. Succession Duties Act, p. 461.
8. Amending Act of 1899, p. 471.
9. Government Regulations Under Succession Duties Act, p. 474.

### APPENDIX I.

#### COLONIAL PROBATE ACT.

An Act to provide for the Recognition in the United Kingdom of Probates and Letters of Administration granted in British possessions.

20th May, 1892.

1. Her Majesty the Queen may, on being satisfied that the Legislature of any British possession has made adequate provision for the recognition in that possession of Probates and Letters of Administration granted by the Courts of the United Kingdom, direct by Order-in-Council that the Act shall, subject to any exceptions and modifications, specified in the order, apply to that possession, and thereupon, while the order is in force, this Act shall apply accordingly.

Applica-  
tion of Act  
by Order-  
in-Council.

8,970 00

8,970 00

\$ c.

8,970 00

8,970 00

Sealing in  
United  
Kingdom  
of Colonial  
Probates  
and Let-  
ters of Ad-  
ministra-  
tion.

2. (1) Where a Court of Probate in a British possession to which this Act applies has granted probate or letters of administration in respect of the estate of a deceased person, the probate or letters so granted may, on being produced to, and a copy thereof deposited with, a Court of Probate in the United Kingdom, be sealed with the seal of that Court, and, thereupon, shall be of the like force and effect, and have the same operation in the United Kingdom, as if granted by that Court.

(2) Provided that the Court shall, before sealing a probate or letters of administration under this section, be satisfied —

(a) that probate duty has been paid in respect of so much (if any) of the estate as is liable to probate duty in the United Kingdom; and

(b) in the case of letters of administration, that security has been given in a sum sufficient in amount to cover the property (if any) in the United Kingdom to which the letters of administration relate; and may require such evidence, if any, as it thinks fit as to the domicile of the deceased person.

(3) The Court may also, if it thinks fit, on the application of any creditor, require, before sealing, that adequate security be given for the payment of debts due from the estate to creditors residing in the United Kingdom.

(4) For the purposes of this section, a duplicate of any probate or letters of administration sealed with the seal of the Court granting the same, or a copy thereof certified as correct by or under the authority of the Court granting the same, shall have the same effect as the original.

(5) Rules of Court may be made for regulating the procedure and practice, including fees and costs, in Courts of the United Kingdom, on and incidental to an application for sealing a probate or letters of administration granted in a British possession to which this Act applies. Such rules shall, so far as they relate to probate duty, be made with the consent of the Treasury, and subject to any exceptions and modifications made by such rules, the enactments for the time being in force in relation to probate duty (including the penal provisions thereof) shall apply as if the person who applies for sealing under this section were a person applying for probate or letters of administration.

Applica-  
tion of Act  
to British  
Courts in  
Foreign  
Countries.

3. This Act shall extend to authorize the sealing in the United Kingdom of any probate or letters of administration granted by a British Court in a foreign country, in like manner as it authorizes the sealing of a probate or letters of administration granted in a British possession to which this Act applies, and the provisions of this Act shall apply accordingly with the necessary modifications.

4. (1) Every Order-in-Council made under this Act shall be laid before both Houses of Parliament, as soon as may be after it is made, and shall be published under the authority of Her Majesty's Stationery Office.

(2) Her Majesty the Queen in Council may revoke or alter any Order-in-Council previously made under this Act.

(3) Where it appears to her Majesty in Council that the legislature of part of a British possession has power to make the provision requisite for bringing this Act into operation in that part, it shall be lawful for Her Majesty to direct by Order-in-Council that this Act shall apply to that part as if it were a separate British possession, and thereupon, while the order is in force, this Act shall apply accordingly.

5. This Act, when applied by an Order-in-Council to a British possession, shall, subject to the provisions of the order, apply to probates and letters of administration granted in that possession either before or after the passing of this Act.

6. In this Act —

The expression "court of probate" means any court of authority by whatever name designated, having jurisdiction in matters of probate, and in Scotland means the Sheriff Court of the county of Edinburgh.

The expressions "probate" and "letters of administration" include confirmation in Scotland, and any instrument having in a British possession the same effect which under English law is given to probate and letters of administration respectively.

The expression "probate duty" includes any duty payable on the value of the estate and effects for which probate or letters of administration is or are granted.

The expression "British Court in a foreign country," means any British Court having jurisdiction out of the Queen's dominions in pursuance of an Order in Council, whether made under any Act or otherwise.

7. This Act may be cited as the Colonial Probates Act, 1892.

Short Title.

of Act to Probates, etc., already granted. Interpretation.



## APPENDIX II.

SELECTED RULES OF THE SURROGATE  
COURTS, ONTARIO.

## PROCEDURE.

1. Non-contentious business shall include all common form business as defined by the Surrogate Courts Act, and the warning of caveats.

2. Application for probate or administration may be made by a solicitor or in person.

3. No probate, or letters of administration with the will annexed, shall issue until after the lapse of seven days from the death of the deceased, unless under the direction of the Judge.

4. No administration shall issue until after the lapse of fourteen days from the death of the deceased, unless under the direction of the Judge.

5. Every application to a Surrogate Court for grant of probate or administration must be by petition prepared, signed and presented by the applicant or his solicitor.

Such petition shall in every case show the value of the whole property of the deceased, and also the separate value of the personal and real estate, and full particulars, and an appraisalment of all said property shall be exhibited with such application and shall be verified upon oath.

6. Upon every application for grant of administration, it must be shown that search for will or testamentary paper has been made in all places where the deceased usually kept his papers, and in his depositories. The affidavit should be made by the applicant, but the proof may, with the Judge's consent, be made otherwise. It must also be shown that search has been made in the office of the registrar of the proper Surrogate Court, and the certificate of such registrar shall be sufficient proof of such search having been made.

7. Unless the Judge shall otherwise order, the registrar shall with the application for grant of administration submit the bond proposed to be given, with the necessary affidavits of justification and of execution, and in every case such bond shall be without material erasure or interlineation.

8. The necessary affidavits to lead grant, and the usual oath of executors and administrators, may be taken at the time the application for grant is signed, or afterwards at any time before the application is submitted to the Judge for his order and direction. The proofs to lead grant may be embodied in one affidavit.

9. If there should appear to be any material variance between the application and affidavits made in support thereof, the Judge may direct such application to be amended according to the fact, and a new notice on such amended application to be sent to the Surrogate Clerk.

10. The due execution of the will or codicil shall be proved by one of the witnesses, or the absence of the witnesses accounted for; in which last case such will or codicil must be established by other proof, to the satisfaction of the Judge.

11. The oath of administrators, and of administrators with the will annexed, is to be so worded as to clear off all persons having a prior right to the grant. In these cases the grant should show on the face of it how the prior interests have been cleared off.

12. The usual oath of administration is to be reduced to writing, and to be subscribed and sworn to by the executors or administrators as an affidavit.

13. Under the statute the several Surrogate Courts have power to appoint an administrator other than the person who, prior to the Act, would have been entitled to the grant. (Section 56, now section 59.) Whenever the Judge sees fit to exercise such a power, the fact should be made plainly to appear in the oath of the administrator, in the letters of administration, and in the administration bond.

14. Where limited administrations are applied for, it must be made to appear that every person entitled in distribution to the property has consented, or renounced, or has been cited and failed to appear, except when the Judge sees fit otherwise specially to direct.

15. No person entitled to a grant of administration of the property of the deceased generally shall be permitted to take a limited grant, except grants for personal estate only, under section 58 (now section 61) of the Surrogate Courts Act.

16. In administration of a special character the recitals in the oath and in the letters of administration must be framed in accordance with the facts of the case.

17. Grants of administration may be made to the guardians of infants and minors, for the use and benefit of such infants and minors during their minority; and elections by minors of their next of kin, or next friend, as the case may be, to such guardianship,

shall be required when the infant is fourteen years of age and over. (See c. 137, R. S. O. ss. 4, 10, 18; now R. S. O. 1887, c. 168, ss. 4, 10, 19).

18. Every will or copy of a will, to which an executor or administrator with the will annexed is sworn, should be marked by such executor or administrator and by the person before whom he is sworn.

19. Executors and administrators shall within a period of eighteen months after grant made, and sooner if the Judge shall so direct, exhibit under oath a true and perfect inventory of the property of the testator or intestate (as the case may be), and render a just and full account of their executorship or administration. The Judge shall, upon application made to him for that purpose, have power to extend the said period of eighteen months. If the executor, or administrator with the will annexed, is the sole legatee or devisee of the property devolving, the Judge may direct that he shall be relieved from the operation of this rule, provided there are no creditors of the estate.

(a) The general rules which govern in the Master's office of the Supreme Court of Judicature under a judgment, or order of reference, and the rules of practice and procedure thereof for the time being, so far as the same can be made to apply, shall be adopted in the case of the auditing an executor's and administrator's account by the Judge, substituting the word "Judge" for the word "Master" and also for the word "Examiner" wherever it occurs in any such rule. (See Con. Rules of Practice).

20. A will deposited for safe keeping in the office of the registrar of the Surrogate Court shall not be removed therefrom, except by the testator in person, unless the order of the Judge permitting such removal shall have been first obtained.

21. In all cases in which it has been heretofore necessary to issue a citation to accept or refuse probate of a will, or to accept or refuse letters of administration, or to issue a subpoena to bring in a testamentary paper, and in all similar cases, the Judge's order shall be made, and shall have the like effect as such citation or subpoena formerly had.

22. The party entering a caveat must declare therein the nature of his interest in the property of the deceased, and state generally the grounds upon which he enters such caveat, and the same shall be signed by the party, or by his solicitor on his behalf, and the proper place mentioned as the address of the party or of his solicitor entering the caveat; and no caveat shall have any force or effect unless the requirements of this rule be in substance complied with.

23. A caveat shall remain in force for the space of three months only, and then expire and be of no effect; but caveats may, subject to the Judge's order, be renewed from time to time.

24. In order to clear off a caveat when no appearance has been entered to a warning duly served, an affidavit of the service of the warning stating the manner of service, and an affidavit of search for appearance and of non-appearance must be filed.

25. No caveat shall affect any grant made on the day on which the caveat is entered, unless notice of such caveat has been received prior to the grant passing the seal.

26. A caveat shall be warned at the place mentioned in it as the address of the person who entered it or of his solicitor.

27. It shall be sufficient for the warning of a caveat, that the registrar of the Court in which application for grant is made send by public post, prepaid and registered, a warning signed by himself bearing the seal of the Court, and directed to the person who entered it, or to his solicitor, if signed by a solicitor, at the address mentioned in it.

28. Any person intending to oppose a grant of probate or administration, for which application has been made to a Surrogate Court, must within ten days after service appear, either personally or by a solicitor, and enter an appearance in such Court, in which appearance the address of the party, or of his solicitor, shall be given. This rule is to apply whether the person intending to oppose the grant has or has not been previously warned to a caveat, or served with a citation.

29. When a party intending to oppose a grant, has filed an appearance with the registrar, no further steps in respect to such grant shall be taken, except under the special direction of the Judge.

30. Citations against all persons in general and other instruments heretofore required to be served by affixing them in some public place, are in future to be served by the insertion of the same as advertisements in such newspapers, local, British, or foreign, as the Judge may, from time to time direct. Such citations can only be allowed to issue in cases where there is an affidavit to lead them and a Judge's order.

31. Citations under the thirty-eighth (now the forty-first) section of the Act may be served by inserting the same as advertisements in such one of the Toronto morning papers, or such other papers, local, British, or foreign, as the Judge of the Court may, by special order, direct.

32. The bond to be given upon any grant of administration shall be according to the forms subjoined, or in a form as near thereto as the circumstances of the case admit.

33. The sureties in such bond are required in all cases to justify. See section 65 (now section 70) of the Surrogate Courts Act, and such justification shall be to an amount or amounts which in the

aggregate shall equal the amount of the penalty of the bond. No Surrogate clerk or registrar shall become surety to any administration bond.

34. In ordinary cases where property is bona fide under the value of two hundred dollars, one surety only may be taken to the administration bond.

35. In all other cases, unless the Judge shall otherwise direct, two sureties are always to be required to the administration bond, and the bond is to be given in double the amount of the fund to be dealt with under the administration.

36. Whenever any renunciation is filed subsequent to notice of application to the surrogate clerk, or any alteration is subsequently made in the grant, notice of such renunciation or alteration is to be immediately forwarded by the registrar of the Court to the surrogate clerk.

37. Every affidavit shall be drawn up in the first person, stating the name of the deponent at the commencement in full, and his description and true place of abode and shall be signed by him.

38. In every affidavit made by two or more deponents, the names of the several persons making it are to be written in the jurat. Except that if the affidavit of all the deponents is taken at one time by the same officer, it shall be sufficient to state that it was sworn by both (or all) of the "above-named" deponents.

39. There shall be appended to or indorsed upon every affidavit, a note signed by the solicitor or the party in person, showing on whose behalf it is filed.

40. Where an affidavit is made by any person who is blind, or who, from his or her signature, or otherwise, appears to be illiterate, the registrar or other officer before whom such affidavit is made, is to state in the jurat that the affidavit was read in his presence to the deponent, and that such deponent seemed perfectly to understand the same; and also that the said deponent made his or her mark, or wrote his or her signature, in the presence of the registrar or other officer, before whom the same was taken. No such affidavit shall be used in evidence in the absence of this statement, unless the Court or a Judge is otherwise satisfied that the affidavit was read over to and apparently perfectly understood by the deponent.

41. No affidavit having in the jurat or body thereof any interlineation, alteration, or erasure shall, without the leave of the Judge, be read or made use of in any matter pending in any Surrogate Court, unless the interlineation or alteration (other than by erasure) is authenticated by the initials of the officer taking the affidavit;

nor in the case of an erasure, unless the words or figures appearing at the time of taking the affidavit to be written on the erasure are re-written and signed or initialed in the margin of the affidavit by the officer taking it.

42. No affidavit which has been sworn before the party on whose behalf the same is offered, or before his solicitor, or before the clerk, or partner of such solicitor is to be admitted, unless the Judge shall otherwise direct.

## REGISTRARS.

46. When it is so desired by any applicant for grant of probate or administration where the value of the property devolving does not exceed \$400, the registrar of the Court in which application is to be made may prepare the application and all other forms necessary in non-contentious business, without the intervention of a solicitor; but in no other case shall he prepare the papers for grant. And in no other case shall any person other than the applicant or his solicitor, either directly or indirectly, prepare the application or other papers to be used in any application or matter in the Surrogate Court, nor shall any person other than a solicitor be permitted to practice in the Surrogate Court.

## CONTENTIOUS BUSINESS.

1. A proceeding shall be adjudged contentious when an appearance has been entered by any person in opposition to the party proceeding, or when a citation or Judge's order has been obtained against a party supposed to be interested in a proceeding, or when an application for grant is made on motion and the right to such grant is opposed, or when application is made to revoke a grant, or when there is a contention as to the right to obtain probate or administration, and before contest terminated.

2. The practice as to appearance shall, in so far as shall be practicable, be that prescribed by the Consolidated Rules of Practice of the Supreme Court of Judicature for Ontario.

3. In contentious proceedings the practice and procedure shall, as nearly as may be, correspond with the practice and procedure in the High Court after appearance entered.

4. If the party who has entered an appearance shall not use due diligence in the prosecuting of the proceedings the applicant may obtain a summons calling upon him to show cause why he should not file a plea within a limited time, or in default thereof why grant should not be made.

5. Any person not named in the petition or in the order of the Judge may intervene and appear thereto on an affidavit showing that he is interested in the estate of the deceased.

6. The party opposing a will may, with his statement of defence, give notice to the party setting up the same that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall be subject to liability in respect of costs in the discretion of the Judge.

7. If any defendant make default in filing and delivering a defence, the action may proceed notwithstanding such default; or the plaintiff may obtain a summons calling upon the defendant to show cause why grant should not be made without further proceedings.

8. In any case not provided for and which there is no analogous practice in the High Court, the party desiring to pursue a claim, remedy or right, may apply to the Judge for direction and order as to the course to be pursued.

# I.

The following shall be the tariff of fees to be taken by the registrars of the Surrogate Court for duties and services in respect of non-contentious business in the said Court:

1. For services rendered under sections 67 and 68 (now sections 74 and 75), see Rule 40, where the value of the property does not exceed \$400 .....	\$1 50
2. Receiving and examining papers and entering application..	1 00
3. Every necessary notice to surrogate clerk.....	25
4. Receiving and entering certificate .....	25
5. Recording every bond with affidavits of justification and execution .....	1 00
6. (a) On every grant of letters of administration where the property devolving is under \$1,000 .....	1 00
(b) \$1,000 and under \$4,000 .....	2 00
(c) \$4,000 and under \$10,000 .....	3 00
(d) \$10,000 and under \$20,000 .....	4 00
(e) \$20,000 and upwards .....	5 00
7. Submitting papers with registrar's report thereon to Judge to lead grant .....	50
8. Recording grant or other instruments under Rule 46, or letters of guardianship, per folio .....	10
9. For preparing probate or letters of administration or of guardianship issued under seal of the Court, each instrument .....	75
10. Ditto—If grant is special .....	1 00
11. Transcript of will, per folio .....	10
12. Certified copy of will in addition, per folio .....	10
13. Drawing special orders or other papers directed by Judge, per folio .....	10
14. Taking every affidavit or administering oath to a witness..	20
15. Attending and entering every order or minute .....	50

16. Every summons or order, and every instrument or other process under seal, not otherwise provided for, if prepared by the registrar, per folio, including fee for sealing .....	8	20
17. For looking up original will or instrument and inspection, or for general search into proceedings .....		30
18. Every other search .....		20
19. Every necessary certificate granted by registrar .....		50
20. Exemplification under seal .....	1	60
If exceeding 5 folios, per folio on the excess..		10
21. For depositing every will of a living person for safe custody, including a deposit receipt.....		50
22. Issuing every subpoena .....		50
23. Writing every necessary letter .....		25
24. Filing every necessary paper .....		10
25. Attending audit, including filing necessary papers thereat.		50
26. For taxing costs and granting certificate.....		50
27. Receiving, entering and filing caveat .....		50
28. Warning to caveat and entering the same .....		30
29. Postage and stamps and all other necessary disbursements to be added in all cases.		
(No fee allowed for filing paper in non-contentious business before probate or letters granted).		
On proof of Will in Solemn Form, and in proceedings for revoking probate, or letters of administration, or for the removal of a guardian.		
1. If the proceedings are disputed or contentious, the same fees may be charged by the registrar as in contentious proceedings.		
2. If the proceedings are undisputed the same charges may be made by him as in non-contentious proceedings.		

## II.

## REGISTRAR'S FEES—CONTENTIOUS BUSINESS.

1. Receiving, entering, and filing caveat, and transmitting notice thereof to surrogate clerk .....	8	75
2. Warning to caveat, and entering same .....		30
3. Receiving, entering and filing bond on appeal .....		25
4. Searching for, making up and transmitting papers to Court of Appeal or High Court of Justice .....		50
5. Every certificate for which no other fee is payable .....		50
6. On every citation, summons or Judge's order .....		50
7. Search in registrar's books or files .....		20
8. Looking up original will or instrument, and inspection, or for general search into proceedings .....		30
9. Filing every necessary paper .....		10
10. Filing and entering every paper required to be minuted....		10



11. Entering every record or issue deposited for trial.....	\$ 50
12. Every subpoena .....	50
13. Administering oath or taking an affidavit .....	20
14. Entering decree, or order in pursuance of judgment, if under five folios .....	50
15. If over five folios, per follo .....	10
16. Entering every order or decree requiring to be entered in the Court book, not otherwise specified, per follo..	10
17. Issuing every writ under seal of the Court, except subpoena	50
18. For every office copy or extract of a minute, order, decree, or other document filed or deposited in the office of the registrar, per follo .....	10
19. For the seal, in addition to the fee, for the copy, and col- lating, if required .....	25
20. Every necessary letter .....	25
21. Taxing every bill of costs, and granting certificate.....	80
22. All outlays for postages and stamps as disbursed to be added in all cases.	
23. After contentious proceedings are closed and a decree for pro- bate granted, or letters of administration have been de- creed to either party, the registrar in addition to the foregoing fees, shall be entitled to receive for business done the like fees as in non-contentious cases.	
On proof of Will in Solemn Form and in proceedings for revoking probate, or letters of administration, or for the removal of a guardian.	
1. If the proceedings are disputed or contentious the same fees may be charged by the registrar as in contentious pro- ceedings.	
2. If the proceedings are undisputed the same fees may be charged by him as in non-contentious proceedings.	

## APPENDIX III.

ORDERS OF COURT RELATING TO TRUST  
CORPORATIONS.\*

191. The Judges may arrange with the Toronto General Trusts Toronto Company to make investments, and to take the securities in the General name of the accountant of the Supreme Court of Judicature, of Trusts Company moneys in Court, upon first mortgages of lands, and may direct the empow- issue of cheques therefor upon condition that the said company do, ered to make In- by proper instrument, guarantee the sufficiency of such securities, vestments and the due payment of interest at the rate of  $4\frac{1}{2}$  per cent. per of funds in annum, half-yearly, on the moneys so invested, from the date of Court. the receipt by the company of the money for each investment, and also the due repayment of the principal moneys so invested; and upon further condition that in case the said company makes an investment as aforesaid at a higher rate than 6 per cent., then the said company is to pay interest thereon to the Court at the rate of  $4\frac{3}{4}$  per cent.; and upon further condition that the said company is to satisfy the official guardian of the said High Court of the sufficiency of the security as to value, and he is to certify the same to the Court before the cheque issues for each investment.

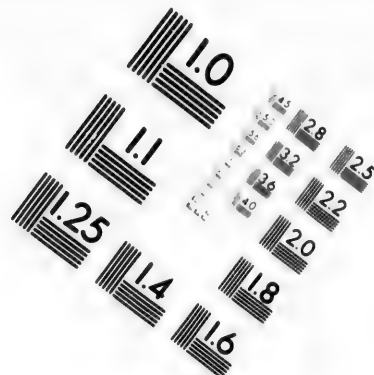
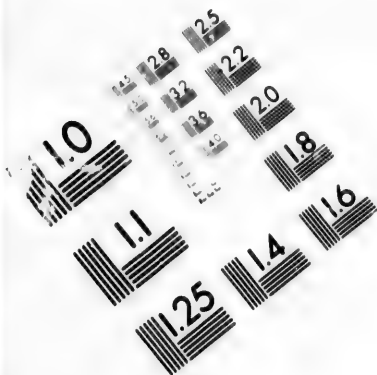
1269. Whereas under Rule 191, it is provided that the Invest- Invest- ment of the moneys in Court by the Toronto General Trusts Com- ments of pany shall be subject to the approval of the official guardian of the funds in High Court of Justice for Ontario: Court.

And whereas, the said official guardian has expressed his desire to be relieved of the duty in question:

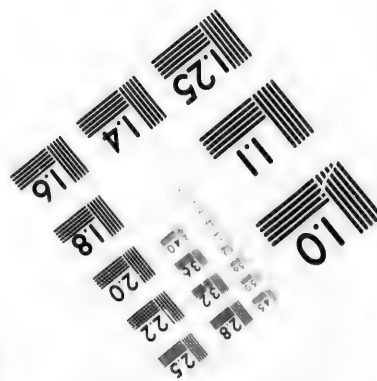
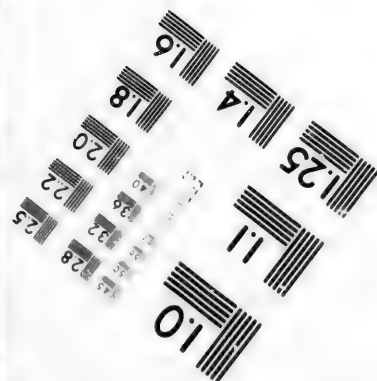
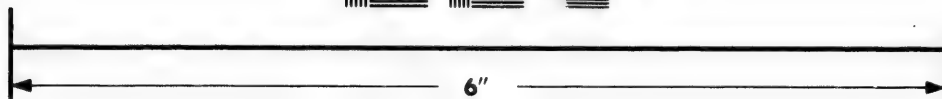
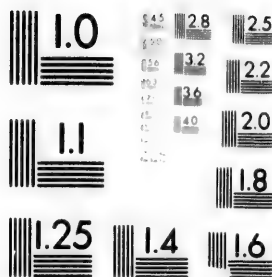
It is ordered, pursuant to sections 114 and 115 of the Judicature Act, that James S. Cartwright, Esquire, the registrar of the Queen's Bench Division of the said High Court of Justice, be appointed in the place of the said official guardian to discharge the said duty; and that the said the Toronto General Trusts Company is to satisfy the said registrar of the Queen's Bench Division of the security as to value, and that he certify the same to Court before cheques issue for each investment, and the said company is to pay into Court, to the credit of the surplus interest funds, the fees heretofore paid to the said official guardian by the said company in respect of said services.

into effect 1st September, 1897.

\*These orders are continued by Order 81 of Rules which came



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## APPENDIX IV.

R. S. O. c. 70.

## An Act respecting the Administration by the Crown of Estates of Intestates.

**H**ER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Adminis-  
tration  
may issue  
to the At-  
torney-  
General in  
cases  
where  
nominee  
of the  
Crown en-  
titled to  
Adminis-  
ter.

1. So often as the Lieutenant-Governor, by a warrant under his privy seal, is pleased to direct Her Majesty's Attorney-General for Ontario to apply for and obtain letters of administration (whether general or limited) of the estate and effects of any person dying intestate, or intestate as to some part of his estate, where, in respect of the interest of Her Majesty in the estate and effects, the administration may be rightfully granted to a nominee of Her Majesty, it shall be lawful for any competent Court, upon application, in pursuance of such warrant, to grant administration to the Attorney-General and his successors in the office of Attorney-General for Ontario, for the use and benefit of Her Majesty. R. S. O. 1887, c. 59, s. 1.

Attorney-  
General  
may ob-  
tain Let-  
ters of Ad-  
ministration where  
Intestate  
leaves no  
known re-  
latives  
within the  
Province,  
etc.

2. Where any person dies in this Province intestate as aforesaid, and without leaving any known relatives living within the Province, or any known relatives who can be readily communicated with, living elsewhere, the Lieutenant-Governor may (if he thinks fit), by warrant under his privy seal, direct the Attorney-General for Ontario to apply for and obtain letters of administration, whether general or limited, of the estate and effects of such person; and it shall be lawful for any competent Court upon application in pursuance of the warrant to grant administration to the Attorney-General, for the use and benefit of Her Majesty, or of such persons as may ultimately appear to be entitled thereto. R. S. O. 1887, c. 59, s. 2.

Rights  
and liabili-  
ties of  
Attorney-  
General to  
vest in  
his succes-  
sors.

3. The administration so granted, and the office of administrator under the grant, with all the estates, rights, duties, and liabilities of such administrator, shall, upon the death, resignation, or removal of the Attorney-General for Ontario for the time being, devolve upon and become vested and continue in the succeeding Attorney-General, by virtue of his appointment, and so in perpetual succession, without any further grant of administration or any assignment or transfer of the estates of the administrator; and all actions, and other proceedings whatever by or against the Attorney-General

for the time being, as such administrator at the time of his death, Power to resign, or removal, shall continue, and may be proceeded with, <sup>to revoke</sup> by, in favour of, and against the succeeding Attorney-General, in <sup>Adminis-</sup> <sup>tration.</sup> like manner; saving always, the effect of every limitation in duration, or otherwise, under the terms of the grant of such administration, and saving to every Court having jurisdiction in this behalf all such right and authority to revoke or repeal such administration as the Court would have had during the continuance of a like administration granted to a nominee of Her Majesty in case this Act had not been passed. R. S. O. 1887, s. 59 s. 3.

4. It shall not be necessary for the Attorney-General applying Security for or obtaining grants of administration to the use or benefit of <sup>for due</sup> Her Majesty, to enter into, or cause to be entered into, any bond <sup>Adminis-</sup> <sup>tration</sup> to the Judge of the Surrogate Court; but the Attorney-General shall, <sup>dispensed</sup> in relation to every such administration, be subject to all the liabilities <sup>with.</sup> and duties imposed on an administrator by the condition of the <sup>Liability</sup> <sup>of Attor-</sup> <sup>ney-Gen-</sup> <sup>eral to be</sup> bond prescribed by the rules and orders now in force, or hereafter <sup>as in con-</sup> <sup>dition of</sup> <sup>bond.</sup> under the Surrogate Courts Act. R. S. O. 1887, c. 59, s. 4.

5. Where administration is granted to the Attorney-General, <sup>Rev. Stat.</sup> <sup>c. 59.</sup> the Lieutenant-Governor in Council may direct the sale, either by <sup>Power to</sup> <sup>sell real</sup> <sup>estate of</sup> <sup>the in-</sup> <sup>testate.</sup> auction or private sale, of any real estate or interest therein in Ontario, to which the intestate died entitled; and the Attorney-General shall thereupon be authorized to sell in accordance with the directions of any Order in Council in that behalf, the whole or any part of the real estate aforesaid, and to convey the same to the purchaser; and every conveyance by the Attorney-General, or his successor in office, shall be as valid and effectual as if the deceased were alive at the time of the making thereof, and had executed the same. R. S. O. 1887, c. 59, s. 5.

6. In case, subsequently to the grant of administration, it is <sup>Rights of</sup> <sup>alleged or ascertained</sup> that the deceased has relatives, or did not <sup>relations</sup> <sup>after the</sup> <sup>issue of</sup> <sup>Adminis-</sup> <sup>tration.</sup> die intestate, the Attorney-General may, if he thinks fit, exercise, subject to the discretion of the Lieutenant-Governor in Council, all or any of the powers by this Act conferred, until some person is appointed by some court of competent jurisdiction to deal with the estate of the deceased; and, notwithstanding such appointment, any sale made in pursuance of this Act may be completed by the execution by the Attorney-General of a conveyance; and until the revocation of the letters granted, the Attorney-General may exercise fully all the powers vested in him as administrator of the estate of the deceased. R. S. O. 1887, c. 59, s. 6.

7. Where administration is taken out under the provisions of Enquiry as this Act, the Attorney-General may apply to the High Court for <sup>to the</sup> <sup>rights of</sup> an order for the making of such inquiries as may be necessary to <sup>Her</sup> <sup>determine</sup> whether or not Her Majesty is entitled to any portion of Majesty.

the estate of the deceased, on account of the deceased dying intestate and without heirs or next of kin, or otherwise, and any judgment made upon such inquiry shall, unless reversed on appeal, be final and conclusive. R. S. O. 1887, c. 59, s. 7.

Recovery  
by Crown  
of real es-  
tate of per-  
sons dying  
intestate  
and with-  
out heirs.

8. (1) Where a person dies in possession of, or entitled to real estate in Ontario, intestate as to such real estate, without any known heirs, the Attorney-General may apply to the High Court for an order for the making of such inquiries as may be necessary to determine whether or not Her Majesty is entitled to any portion of the real estate of the deceased on account of his dying intestate, and without heirs; and any judgment or order given upon such inquiry shall, unless reversed on appeal, be final and conclusive.

When  
Attorney-  
General  
recovers.

(2) Where the Attorney-General is entitled to apply under the preceding sub-section, he may bring an action either in his own name, or on behalf of Her Majesty, or in the name of Her Majesty, to recover possession of the real estate of the deceased, and shall be entitled to judgment and to recover possession, unless the person claiming adversely shows that the deceased did not die intestate as to such real estate, or that he left heirs, or that some other person is entitled to the said real estate. R. S. O. 1887, c. 59, s. 8.

Applica-  
tion by  
Attorney-  
General to  
compel an  
account by  
adminis-  
trator in  
certain  
cases.

9. Where a person has died or dies intestate in this Province, and administration has been or may be hereafter granted to some person not one of the next of kin, and it is doubtful whether the intestate left any next of kin him surviving, or there are no known next of kin resident in Ontario, the Attorney-General, if he deems it in the interest of justice, may apply to the High Court for an order requiring the administrator to account for his dealings with the estate, and may question in such proceedings the validity of any releases or settlements with any alleged next of kin, and it shall be lawful for any competent Court to revoke such administration, and to grant administration to the Attorney-General and his successors in the office of the Attorney-General. Ont. Acts, 1896, c. 14, s. 82.

Disposi-  
tion of  
moneys.

10. Moneys realized from estates to which the Attorney-General is administrator under this Act, shall be kept in a separate account in such bank, or invested in such manner as the Lieutenant-Governor may from time to time appoint, and all moneys which have been unclaimed for ten years shall, from time to time, be paid into the Consolidated Revenue Fund of Ontario. R. S. O. 1887, c. 59, s. 9.

Interest  
allowable  
to person  
entitled to  
moneys.

11. Any person proving title to such moneys shall be entitled to receive the same, with interest, at such a rate as the Lieutenant-Governor may, having regard to the rate realized therefrom from time to time direct. R. S. O. 1887, c. 59, s. 10.

12. Any one claiming to be entitled to such estate, or to any interest therein, or to any part of the proceeds thereof, may apply to the High Court upon petition for an order or judgment declaring his rights in respect thereto; and the Court may thereupon order such inquiries as may be necessary to determine the same, and may finally adjudicate thereupon; but no application under this section shall be entertained unless security for costs is given by the applicant, in case the Attorney-General thinks fit to demand the same. R. S. O. 1887, c. 59, s. 11.

13. The Attorney-General may deduct from moneys received on account of any estate, all disbursements made by him in respect to inquiries which he may have considered it expedient to make before taking out administration, as well as disbursements otherwise made by him in respect of the estate. R. S. O. 1887, c. 59, s. 12.

14. Where the Attorney-General is appointed or becomes administrator or trustee for an estate, and he, or any of his predecessors in the trust, has given such notice as under the Trustee Act would be sufficient for the protection of an administrator, the provisions of the said Act shall apply to the Attorney-General, and to the estate. R. S. O. 1887, c. 59, s. 13.

15. After such notice, and notwithstanding the ten years limited by section 10 of this Act have not elapsed, the Attorney-General may pay any money remaining in his hands, unclaimed, into the Consolidated Revenue Fund of Ontario; or may pay the same, or any part thereof, or assign over personal property remaining in his hands, in accordance with any direction of the Lieutenant-Governor in Council, made under section 6 of the Act respecting Escheats and Forfeitures. R. S. O. 1887, c. 59, s. 14.

16. In such case no claim shall be maintained against Her Majesty, or this Province, in respect of any moneys or personal property paid over or assigned to any person or persons under said section 6 of the Act respecting Escheats and Forfeitures aforesaid, or under this Act; but this shall not prejudice the right of a creditor or claimant to follow the said moneys or property, or proceeds, into the hands of the person who may have received the same under the authority of an Order in Council. R. S. O. 1887, c. 59, s. 15.

Rights of persons having claims on the estate.

Attorney-General may retain disbursements made in respect of enquiries. Protection of Attorney-General acting as Administrator. Rev. Stat., c. 129.

Distribution of assets by Attorney-General after notice. Rev. Stat., c. 114.

Her Majesty and the Province not liable where property transferred but right to follow property affected. Rev. Stat., c. 114.



## APPENDIX V.

R. S. O. 1897, c. 112.

## An Act to amend the law relating to Mortmain and Charitable Uses.

- Short Title.** 1. This Act may be cited as the "Mortmain and Charitable Uses Act." Ont. Acts, 1892, c. 20, s. 1.
- Application of Act.** 2. So far as this Act applies to wills, the same shall only apply to wills of testators dying on or after the 14th day of April, 1892. Ib. c. 20, s. 2.
- "Land," meaning of** 3. "Land" in this Act shall include tenements and hereditaments, corporeal and incorporeal, of any tenure; but not money secured on land or other personal estate arising from or connected with land. Ib. c. 20, s. 3.
- Land devised to charity to be sold.** 4. Land may be devised by will to or for the benefit of any charitable use; but, except as hereinafter provided, such land shall, notwithstanding anything in the will contained to the contrary, be sold within two years from the death of the testator, or such extended period as may be determined by the High Court or a Judge thereof in Chambers. Ib. c. 20, s. 4.
- Where land remains unsold after expiration of two years.** 5. So soon as the time limited for the sale of any land under any such devise shall have expired without the completion of the sale of the land, the land shall vest forthwith in the accountant of the Supreme Court of Judicature for Ontario, and the High Court shall cause the same to be sold, or the sale completed (as the case may be), with all reasonable speed by the administering trustees for the time being thereof; and for this purpose may make orders directing such trustees to proceed with the sale or completion of the sale of such land, or removing such trustees and appointing others; and may provide by any such order, or otherwise, for the payment of the proceeds of the sale to the said trustees in trust for the charity, and for the payment of the costs and expenses incurred by the said trustees, or otherwise, in or connected with such sale and proceedings. Ib. c. 20, s. 5.
- Personal estate directed to be laid out in land.** 6. Any personal estate by will directed to be laid out in the purchase of land to or for the benefit of any charitable uses, shall, except as hereinafter provided, be held to or for the benefit of the charitable uses as though there had been no direction to lay it out in the purchase of land. Ib. c. 20, s. 6.

7. The High Court, or a Judge thereof sitting in Chambers, if satisfied that land devised by will to or for the benefit of any charitable use, or proposed to be purchased out of personal estate by will directed to be laid out in the purchase of land, is required for actual occupation for the purposes of the charity, and not as an investment, may, by order, sanction the retention or acquisition, as the case may be, of such land. *Ib. c. 20, s. 7.*

8. Money charged or secured on land or other personal estate arising from or connected with land, shall not be deemed to be subject to the provisions of the statutes known as the Statutes of Mortmain, or of Charitable Uses, as respects the will of a person dying on or after the 14th day of April, 1802, or as respects any other grant or gift made after the said date. *Ib. c. 20, s. 8.*

9. The jurisdiction of the High Court under this Act is to be exercised by a Judge in Chambers or otherwise, and may be exercised in a summary manner so as to avoid all unnecessary expense. *Ib. c. 20, s. 9.*

10. This Act affects only devises or legacies which, prior to the 14th day of April, 1802, would have been void, and shall not be construed as taking away any right prior to that date, by statute or otherwise, possessed by any corporation; nor shall this Act be construed as expressly or by implication affecting any actions then pending, or any question whatever therein. *Ib. c. 20, s. 10.*

## APPENDIX VI.

Distribution Sections of the Devolution of Estates Act,  
R. S. O. 1897, c. 127.Interpre-  
tation.

**22.** The words and expressions hereinafter mentioned which in their ordinary signification have a more confined or a different meaning, shall, where they occur in the next fourteen sections, numbered from 23 to 36 inclusive, except where the nature of the provisions or the context thereof excludes such construction, be interpreted as follows, that is to say:

"Land."

1. "Land" shall extend to messuages, and all other hereditaments, whether corporeal or incorporeal, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties, or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles and interests, or any of them, are in possession, reversion, remainder or contingency:

"Purchaser."

2. "The purchaser" shall mean the person who last acquired the land otherwise than by descent or than by any partition, by the effect of which the land becomes part of, or descendible in the same manner as, other land acquired by descent:

"Descent."

3. "Descent" shall mean the title to inherit land by reason of consanguinity, as well where the heir is an ancestor or collateral relation, as where he is a child or other issue:

"Descendants of any ancestor."

4. "Descendants" of any ancestor shall extend to all persons who must trace their descent through such ancestor:

"Person last entitled to land."

5. "The person last entitled" to land shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof:

"Assurance."

6. "Assurance" shall mean any deed or instrument (other than a will) by which any land may be conveyed or transferred at law or in equity. R. S. O. 1887, c. 108, s. 11 (1-6).

## DESCENTS BEFORE 1ST JULY, 1834.

Act not to  
extend to  
descents  
before 1st  
July, 1834.

**23.** This Act shall not extend to any descent which took place on the death of any person who died before the first day of July, 1834. R. S. O. 1887, c. 108, s. 12.

## DESCENTS SINCE 1ST JULY, 1834.

**24.** The next six sections of this Act, numbered from 25 to 30 inclusive, shall not have operation retrospectively to a period of time anterior to the sixth day of March, 1834, so as, by force of any of their provisions, to render any title valid, which in regard to any particular estate had, prior to that day, been adjudged, or has been or may be in any suit which was depending on that day, adjudged invalid on account of any defect, imperfection, matter or thing which is by such sections altered, supplied or remedied; but in every such case the law in regard to any such defect, imperfection, body or any of his ancestors, or under any limitation having the matter or thing, shall, as applied to such title, be deemed and taken to be as if those sections of this Act had not been passed. R. S. O. 1887, c. 108, s. 13.

**25.** In every case on and after the first day of July, 1834, descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title require, the person last entitled to the land shall for the purposes of this Act be considered to have been the purchaser thereof, unless it is proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it is proved that he inherited the same; and, in like manner, the last person from whom the land is proved to have been inherited shall in every case be considered to have been the purchaser, unless it is proved that he inherited the same. R. S. O. 1887, c. 108, s. 14.

**26.** Where land is devised by a testator dying after the first day of July, 1834, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee and not by descent; and where any land is limited by any assurance, executed after the said first day of July, 1834, to the person or to the heirs of the person who thereby conveys the same land, such person shall be considered to have acquired the same as a purchaser, by virtue of such assurance, and shall not be considered to be entitled thereto as of his former estate or part thereof. R. S. O. 1887, c. 108, s. 15.

**27.** Where a person acquires land by purchase, under a limitation to the heirs, or to the heirs of the body or any of his ancestors, contained in an assurance executed after the first day of July, 1834, or under a limitation to the heirs, or to the heirs of the same effect, contained in a will of any testator dying after the first day of July, 1834, then and in any of such cases, such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land. R. S. O. 1887, c. 108, s. 16.

Descent shall always be traced from the purchaser. Who to be deemed purchaser. Imp. Act, 3-4 W. iv. c. 106, s. 2. Heir entitled under a will shall take as devisee, and a limitation to the grantor or his heir shall create an estate by purchase. Imp. Act, 3-4 W. iv. c. 106, s. 3. Where heirs take by purchase under limitations to the heirs of their ancestor the land shall descend, as if the ancestor had been the purchaser. Imp. Act, 3-4 W. iv. c. 106, s. 4.

After the death of a person attainted, his descendants may inherit.  
Imp. Act, 3-4 W. iv. c. 106, s. 10.

**28.** Where the person from whom the descent of any land is to be traced has had any relation who, having been attainted, died before such descent took place, then such attainer shall not prevent any person from inheriting such land who would have been capable of inheriting the same by tracing his descent through such relation if he had not been attainted, unless such land escheated in consequence of such attainer before the 1st day of July, 1834. R. S. O. 1887, c. 108, s. 17.

Proof of entry by heirs not necessary.

**29.** Proof of entry by the heir after the death of the ancestor shall in no case be necessary in order to prove title in such heir, or in any person claiming by or through him. R. S. O. 1887, c. 108, s. 18.

Limitations made before 1st July, 1834 to the heirs of a person then living shall take effect as if this Act had not been passed.  
Imp. Act, 3-4 W. iv. c. 106, s. 12.

**30.** Where any assurance executed before the said first day of July, 1834, or the will of any person who died before that day, contains any limitation or gift to the heir or heirs of any person under which the person or persons answering the description of heir is entitled to an estate by purchase, then the person or persons who would have answered such description of heir if this Act had not been passed shall become entitled by virtue of such limitation or gift, whether the person named as ancestor was or was not living on or after the said first day of July, 1834. R. S. O. 1887, c. 108, s. 19.

#### DESCENTS BETWEEN 1ST JULY, 1834, AND 1ST JANUARY, 1852.

Descents between the 1st July 1834, and 31st December 1851.

**31.** As respects every descent between the first day of July, 1834, and the thirty-first day of December, 1851, both days included, and as respects any descent not included or provided for in the sections of this Act numbered from 41 to 67, both included, the following sections, numbered from 32 to 36, both included, shall apply retrospectively to the first day of July, 1834, and also prospectively, as the case may be, and shall be construed as if the same had been passed on the said first day of July, 1834. R. S. O. 1887, c. 108, s. 21.

Brothers and sisters shall trace descent through parents.  
Imp. Act, c. 108, s. 22.

**32.** No brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent. R. S. O. 1887, c. 108, s. 22.

Lineal ancestor to be heir in preference to collateral persons claiming through him.  
Imp. Act, 3-4 W. iv. c. 106, s. 6.

**33.** Every lineal ancestor shall be capable of being heir to any of his issue, and in any case where there is no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor; so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue. R. S. O. 1887, c. 108, s. 23.

**34.** None of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants have failed; and no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants have failed; and no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants have failed. *R. S. O. 1887, c. 108, s. 24.*

*The male line to be preferred.*  
*Imp. Act, 34 W. IV. c. 106, s. 7.*

**35.** Where there is a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there is a failure of male maternal ancestors of such person, and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor and her descendants. *R. S. O. 1887, c. 108, s. 25.*

*The mother of the more remote male ancestor to be preferred to the mother of a less remote male ancestor.*  
*Imp. Act, 34 W. IV. c. 106, s. 7.*

**36.** Any person related to the person from whom the descent is to be traced by the half blood, shall be capable of being his heir, and the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood and his issue, where the common ancestor is a male, and next after the common ancestor where such common ancestor is a female; so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother. *R. S. O. 1887, c. 108, s. 26.*

*Half blood to inherit after the whole blood of the same degree.*  
*Imp. Act, 34 W. IV. c. 106, s. 9.*

## DESCENTS BETWEEN 1ST JANUARY, 1852, AND 1ST JULY, 1886.

**37.** The twenty-seven sections numbered from 41 to 67, both included, shall apply retrospectively to the first day of January, 1852, inclusive, and also prospectively, as the case may be, shall be construed as if the same had been passed on the said first day of January, 1852, but sections 38 to 55 inclusive shall not apply to estates of persons dying on or after the first day of July, 1886; and sections 56 to 67 inclusive shall, as to the estates of such last mentioned persons, apply only subject to the provisions of sections 1 to 21 inclusive. *60 V. c. 15, s. 2.*

*Descents between the 1st of January, 1852, and 1st July, 1886.*

**38.** In the said twenty-seven sections of this Act numbered from 41 to 67 both inclusive—

Inter-  
pretation as to  
sections 41  
to 67.  
"Real  
estate."

1. "Real estate" shall be construed to include every estate, interest and right, legal and equitable, held in fee simple or for the life of another (except as in section 50 is excepted) in lands, tenements and hereditaments in Ontario, but not such as are determined or extinguished by the death of the intestate seised or possessed thereof, or so otherwise entitled thereto, nor to leases for years; and

"Inheri-  
tance."

2. "Inheritance," as therein used, shall be understood to mean real estate as herein defined, descended or succeeded to, according to the provisions of the said twenty-seven sections. R. S. O. 1887, c. 108, s. 28.

Persons  
described  
"as living"  
or "as hav-  
ing died."

**39.** Where in the said sections, numbered from 41 to 67, both included, any person is described as living, it shall be understood that he was living at the time of the death of the intestate from whom the descent or succession came, and where any person is described as having died, it shall be understood that he died before such intestate. R. S. O. 1887, c. 108, s. 29.

"Where  
the estate  
came to  
the inter-  
state on the  
part of the  
father," or  
"mother,"  
meaning  
of.

**40.** Where in any of the said sections the expressions "where the estate comes to the intestate on the part of the father" or "mother," as the case may be, are used, the same shall be construed to include every case where the inheritance came to the intestate by devise, gift or descent from the parent referred to, or from any relative of the blood of such parent. R. S. O. 1887, c. 108, s. 30.

How real  
estate of  
an inter-  
state dying  
on or after  
1st Jan-  
uary, 1852,  
shall des-  
cend.

**41.** Where any person dies seised in fee simple or for the life of another of any real estate in Ontario, without having lawfully devised the same, such real estate shall descend or pass by way of succession in manner following, that is to say:—

*Firstly.* To the lineal descendants of the intestate, and those claiming by or under them, *per stirpes*;

*Secondly.* To his father;

*Thirdly.* To his mother; and

*Fourthly.* To his collateral relatives subject in all cases to the rules and regulations hereinafter prescribed. R. S. O. 1887, c. 108, s. 31.

As to de-  
scendants  
in equal  
degrees of  
consan-  
guinity.

**42.** If the intestate leaves several descendants in the direct line of lineal descent, and all of equal degree of consanguinity to such intestate, the inheritance shall descend to such persons in equal parts, however remote from the intestate the common degree of consanguinity may be. R. S. O. 1887, c. 108, s. 32.

**43.** If one or more of the children of such intestate are living and one or more are dead, the inheritance shall descend to the children who are living, and to the descendants of such children as have died; so that each child who is living shall inherit such share as would have descended to him if all the children of the intestate who have died leaving issue, had been living; and so that the descendants of each child who is dead shall inherit in equal shares the share which their parent would have received if living. R. S. O. 1887, c. 108, s. 33.

**44.** The rule of descent prescribed in the last preceding section shall apply in every case where the descendants of the intestate, entitled to share in the inheritance, are of unequal degrees of consanguinity to the intestate, so that those who are in the nearest degree of consanguinity shall take the shares which would have descended to them, had all the descendants in the same degree of consanguinity who have died leaving issue been living, and so that the issue of the descendants who have died, shall respectively take the shares which their parents, if living, would have received. R. S. O. 1887, c. 108, s. 34.

**45.** In case the intestate dies without lawful descendants and leaving a father, then the inheritance shall go to such father, unless the inheritance came to the intestate on the part of his mother, and such mother is living; and if such mother is dead, the inheritance descending on her part shall go to the father for life, and the reversion to the brothers and sisters of the intestate and their descendants, according to the law of inheritance by collateral relatives hereinafter provided; and if there are no such brothers and sisters, or their descendants living such inheritance shall descend to the father. R. S. O. 1887, c. 108, s. 35.

**46.** If the intestate dies without descendants and leaving no father, or leaving a father not entitled to take the inheritance under the last preceding section, and leaving a mother and brothers and sisters, or the descendants of brothers and sisters, then the inheritance shall descend to the mother during her life, and the reversion to such brothers or sisters of the intestate, as are living, and the descendants of such as are dead, according to the same law of inheritance hereinafter provided; and if the intestate in such case leaves no brother or sister, nor any descendant of any brother or sister, the inheritance shall descend to the mother. R. S. O. 1887, c. 108, s. 36.

**47.** If there is no father and mother capable of inheriting the estate, it shall descend in the cases hereinafter specified to the collateral relatives of the intestate; and if there are several of such



relatives all of equal degree of consanguinity to the intestate, the inheritance shall descend to them in equal parts, however remote from the intestate the common degree of consanguinity may be. R. S. O. 1887, c. 108, s. 37.

Succession  
of brothers  
and sisters  
and their  
descen-  
dants.

**48.** If all the brothers and sisters of the intestate are living, the inheritance shall descend to such brothers and sisters; and if any one or more of them are living and any one or more are dead, then to the brothers and sisters and every of them who are living, and to the descendants of such brothers and sisters as have died, so that each brother or sister who is living shall inherit such share as would have descended to him or her, if all the brothers or sisters of the intestate who have died leaving issue had been living, and so that such descendants shall inherit in equal shares the share which their parent, if living, would have received. R. S. O. 1887, c. 108, s. 38.

As to such  
descen-  
dants in  
unequal  
degrees.

**49.** The same law of inheritance prescribed in the last section shall prevail as to the other direct lineal descendants of every brother and sister of the intestate, to the remotest degree, wherever such descendants are of unequal degree. R. S. O. 1887, c. 108, s. 39.

If there be  
no heir un-  
der the  
preceding  
13 sections.

**50.** If there is no heir entitled to take under any of the preceding thirteen sections, the inheritance if the same came to the intestate on the part of his father, shall descend:

*Firstly.* To the brothers and sisters of the father of the intestate in equal shares, if all are living.

*Secondly.* If one or more are living, and one or more have died leaving issue, then to such brothers and sisters as are living, and to the descendants of such of the said brothers and sisters as have died—in equal shares.

*Thirdly.* If all such brothers and sisters have died, then to their descendants; and in all such cases the inheritance shall descend in the same manner as if all such brothers and sisters had been the brothers and sisters of the intestate. R. S. O. 1887, c. 108, s. 40.

Further  
provision.

**51.** If there be no brothers or sisters, or any of them, of the father of the intestate, and no descendants of such brothers or sisters, then the inheritance shall descend to the brothers and sisters of the mother of the intestate, and to the descendants of such of the said brothers and sisters as have died, or if all have died, then to their descendants, in the same manner as if all such brothers and sisters had been the brothers and sisters of the father. R. S. O. 1887, c. 108, s. 41.

Further  
provision  
if the es-  
tate came  
on mo-  
ther's side.

**52.** In all cases not provided for by the next preceding fifteen sections, where the inheritance came to the intestate on the part of his mother, the same, instead of descending to the brothers and sisters of the intestate's father, and their descendants, as prescribed

in section 50, shall descend to the brothers and sisters of the intestate's mother, and to their descendants, as directed in the last preceding section; and if there are no such brothers and sisters or descendants of them, then the inheritance shall descend to the brothers and sisters, and their descendants, of the intestate's father, as before prescribed. R. S. O. 1887, c. 108, s. 42.

**53.** In cases where the inheritance did not come to the intestate on the part of either the father or the mother, the inheritance shall descend to the brothers and sisters both of the father and mother of the intestate in equal shares, and to their descendants, in the same manner as if all such brothers and sisters had been the brothers and sisters of the intestate. R. S. O. 1887, c. 108, s. 43.

**54.** Relatives of the half blood shall inherit equally with those of the whole blood in the same degree, and the descendants of such relatives shall inherit in the same manner as the descendants of the whole blood, unless the inheritance came to the intestate by descent, devise or gift from some one of his ancestors; in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance. R. S. O. 1887, c. 108, s. 44.

**55.** On failure of heirs under the preceding rules, the inheritance shall descend to the remaining next of kin of the intestate, according to the rules in the English Statute of Distribution of Personal Estate. R. S. O. 1887, c. 108, s. 45.

## GENERAL PROVISIONS.

**56.** Where there is but one person entitled to inherit according to the provisions of section 37 and following sections of this Act, he shall take and hold the inheritance solely; and where an inheritance, or a share of an inheritance, descends to several persons under such provisions, they shall take as tenants in common, in proportion to their respective rights. R. S. O. 1887, c. 108, s. 46.

**57.** Descendants and relatives of the intestate begotten before his death, but born thereafter, shall in all cases inherit in the same manner as if they had been born in the lifetime of the intestate and had survived him. R. S. O. 1887, c. 108, s. 47.

**58.** Children and relatives who are illegitimate shall not be entitled to inherit under any of the provisions of this Act. R. S. O. 1887, c. 108, s. 48.

**59.** The estate of the husband as tenant by the curtesy, or of a widow as tenant in dower, shall not be affected by any of the provisions of the last preceding twenty-two sections of this Act, nor except as provided by section 31 of *The Wills Act of Ontario* will, not shall the same affect any limitation of any estate by deed or will, affected

Rev. Stat. c. 128. or any estate which, although held in fee simple or for the life of another, is so held in trust for any other person, but all such estates shall remain, pass and descend, as if the last twenty-two sections of this Act numbered from 37 to 58, both included, had not been passed. R. S. O. 1887, c. 108, s. 49.

Section 21 of the Devolution of Estates Act is not printed in the text and is therefore added here.

**Rules of procedure.** **21.—(1)** The Official Guardian shall have power with the approval of the Lieutenant-Governor in Council, or of the Judges of the High Court of Justice, to frame Rules regulating the practice and procedure to be followed in all proceedings under this Act, in which the privity or consent of such Official Guardian shall be required; and also to frame a tariff of the fees to be allowed and paid to solicitors for services rendered in such proceedings. Such Rules and tariffs when approved as aforesaid shall be published in the *Ontario Gazette*, and shall thereupon have the force of law; and the same shall be laid before the Legislative Assembly at the next session after the promulgation thereof.

**Appointment of Deputy Official Guardian pro tem.** **(2)** In case the Lieutenant-Governor sees occasion in consequence of the illness or absence of the Official Guardian or for any other cause, he may appoint a person to act as the Deputy *pro tem*, of the Official Guardian for the purposes of this Act; and a deputy appointed by the Lieutenant-Governor shall have all the powers of the Official Guardian as respects the said purposes.

**Affidavits.** **(3)** Affidavits may be used in proceedings taken in pursuance of this Act; and such affidavits may be sworn before any Commissioner for taking affidavits or before a Notary Public. Ont. Stats. 1891, c. 18, s. 7.

## APPENDIX VII.

## R. S. O. C. 24.

An Act to provide for the payment of Succession Duties  
in certain cases.

**W**HEREAS this Province expends very large sums annually for asylums for the insane and idiots, and for institutions for the blind and for deaf mutes, and towards the support of hospitals and other charities, and it is expedient to provide a fund for defraying part of the said expenditure by a succession duty on certain estates of persons dying as hereinafter mentioned:

Therefore Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. This Act may be cited as "The Succession Duty Act," and shall apply to the estates of persons dying on or after the 1st day of July, 1892, unless where it is herein otherwise expressly provided.

2. The word "property" in this Act includes real and personal property of every description, and every estate or interest therein capable of being devised or bequeathed by will or of passing on the death of the owner to his heirs or personal representatives.

3. This Act shall not apply:—

1. To any estate the value of which, after payment of all debts and expenses of administration, does not exceed \$10,000; nor

2. To property given, devised or bequeathed for religious, charitable or educational purposes; nor

3. To property passing under a will, intestacy or otherwise, to or for the use of the father, mother, husband, wife, child, grandchild, daughter-in-law or son-in-law of the deceased, where the aggregate value of the property of the deceased does not exceed \$100,000 in value.

4.—(1) Save as aforesaid, the following property shall be subject to a succession duty as hereinafter provided, to be paid for the use of the Province over and above the fees payable under the Surrogate Courts Act;

When Act shall not apply.

Property liable to succession duties.

Rev.Stat.,  
c. 59.

Property  
situate in  
Province.

Property  
voluntar-  
ily trans-  
ferred in  
contempla-  
tion of  
death.

Donat-  
ionesmor-  
tiscansa or  
voluntary  
disposi-  
tions made  
within 12  
months be-  
fore death,  
etc.

Property  
trans-  
ferred by  
owner to  
himself  
jointly  
with some  
other per-  
son.

Property  
passing  
under  
settlement

- (a) All property situate within this province, and any interest therein or income therefrom, whether the deceased person, owning or entitled thereto, was domiciled in Ontario at the time of his death or was domiciled elsewhere, passing either by will or intestacy;
- (b) All property situate as aforesaid or any interest therein or income therefrom, which shall be voluntarily transferred by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, bargainor, vendor or donor, or made or intended to take effect, in possession or enjoyment after such death, to any person in trust or otherwise, or by reason whereof any person shall become beneficially entitled in possession or expectancy to any property, or the income thereof;
- (c) Any property taken as a donatio mortis causa made by any person dying on or after the 7th day of April, 1896, or taken under a disposition made by any person so dying, purporting to operate as an immediate gift inter vivos, whether by way of transfer, delivery, declaration of trust, or otherwise which shall not have been bona fide made twelve months before the death of the deceased, including property taken under any gift, whenever made, of which property bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise;
- (d) Any property which a person dying on or after the 7th day of April, 1896, having been absolutely entitled thereto, has caused, or may cause, to be transferred to, or vested in himself, and any other person jointly, whether by disposition or otherwise, so that the beneficial interest therein, or in some part thereof, passes or accrues by survivorship on his death to such other person, including also any purchase or investment effected by the person who was absolutely entitled to the property either by himself alone, or in concert, or by arrangement with any other person;
- (e) Any property passing under any past or future settlement including any trust, whether expressed in writing or otherwise, and if contained in a deed or other instrument effecting the settlement, whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person, made by any person dying on or after the 7th day of April, 1896, by

deed or other instrument not taking effect as a will, whereby an interest in such property or the proceeds of sale thereof for life, or any other period, determinable by reference to death, is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right by the exercise of any power to restore to himself, or to reclaim the absolute interest in such property or the proceeds of sale thereof, or to otherwise resettle the same or any part thereof;

- (f) Any annuity or other interest purchased or provided by Annuities, any person dying on or after the 7th day of April, 1896, etc. either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.

(2) The descriptions of properties in clauses (c), (d), (e) and (f) Particular description of property shall not be construed to restrict the generality of the descriptions contained in clauses (a) and (b), and subject to the provisions of sub-section 8 of this section, the expressions "all property" and "any property" in this section shall be restricted to property situated within this Province. <sup>not to affect general words.</sup>

(3) Where the aggregate value of the property of the deceased Amount of exceeds \$100,000, and passes in manner aforesaid, either in whole duty. or in part, to or for the benefit of the father, mother, husband, wife, child, grandchild, or other lineal descendant or daughter-in-law or son-in-law of the deceased, the same, or so much thereof as so passes (as the case may be) shall be subject to a duty of \$2.50 for every \$100 of the value.

(4) Where the aggregate value of the property exceeds \$200,000, the whole property which passes as aforesaid shall be subject to a duty of \$5 for every \$100 of the value.

(5) Where the value of the property of the deceased exceeds \$10,000 so much thereof as passes to or for the benefit of the grandfather or grandmother or any other lineal ancestor of the deceased, except the father and mother, or to any brother or sister of the deceased, or to any descendants of such brother and sister, or to a brother or sister of the father or mother of the deceased, or of any descendant of such last mentioned brother or sister, shall be subject to a duty of \$5 for every \$100 of the value.

(6) Where the value of the property of the deceased exceeds \$10,000 and any part thereof passes to or for the benefit of any person in any other degree of collateral consanguinity to the deceased than is above described, or to or for the benefit of any stranger in blood to the deceased, save as hereinbefore provided for, the same shall be subject to a duty of \$10 for every \$100 of the value.

Proviso. (7) Provided that where the whole value of any property devised, bequeathed or passing to any one person under a will or intestacy does not exceed \$200, the same shall be exempt from payment of the duty imposed by this section.

Proviso as to property brought into Province for administration. (8) Provided also that any portion of the estate of any deceased person, whether at the time of his death such person was domiciled in the Province of Ontario or was domiciled elsewhere, which is brought into the Province by the executors or administrators of the estate to be administered or distributed in this Province shall be liable to the duty hereinbefore imposed; but if any succession or legacy duty or tax has been paid upon such property elsewhere than in Ontario, and such duty or tax is equal to or greater than the duty payable on property in this Province, no duty shall be payable thereon in this Province; and if the duty or tax so paid elsewhere is less than the duty payable on property in this Province, then the property upon which such duty or tax has been paid elsewhere shall be subject to the payment of such portion only of the succession duty provided for in the preceding sub-sections of this section as will equal the difference between the duties payable under this Act with respect to property in the Province of Ontario and the duty or tax so paid elsewhere.

Personal liability of executors. (9) In case an executor or administrator shall, in order to escape payment of succession duty, imposed by this Act, distribute any part of the said estate without bringing the same into this Province, such executor or administrator shall be liable personally to pay to Her Majesty the amount of the duty which would have been payable had the assets so distributed been brought within this Province.

Proviso. Provided that this sub-section shall not apply to payments made to persons domiciled without the Province out of assets situate without the Province.

(10) Nothing herein contained shall render liable for duty any property bona fide transferred for a consideration that is of a value substantially equivalent to the property transferred.

Executors, etc., to file inventory and bonds for payment of duty. 5.—(1) An executor or administrator applying for letters probate or letters of administration to the estate of a deceased person shall, before the issue of letters probate or administration to him, make and file with the Surrogate Registrar a full, true and correct statement under oath showing:

- (a) A full itemized inventory of all the property of the deceased person and the market value thereof, and
- (b) The several persons to whom the same will pass under the will or intestacy and the degree of relationship, if any, in which they stand to the deceased;

and the executor or administrator shall, before the issue of letters probate or letters of administration, deliver to the Surrogate Registrar a bond in a penal sum equal to ten per centum of the sworn value of the property of the deceased person liable, or which may become liable, to succession duty, executed by himself and two sureties, to be approved by the Registrar, conditioned for the due payment to Her Majesty of any duty to which the property coming to the hands of such executor or administrator of the deceased may be found liable.

(2) This section does not apply to estates in respect of which no succession duty is payable.

(3) Where property passes on the death of the deceased and Where no no executor or administrator can be made accountable for executor or administrator succession duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession, and also to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing, or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title shall be accountable for the succession duty on the property, and shall, within two months after the death of the deceased, or such later time as the Treasurer of the Province for the time being shall allow, deliver to the Surrogate Registrar of the county in which the said property is situate, and verify an account to the best of his knowledge and belief of the property.

6. In case the Treasurer of the Province is not satisfied with the value so sworn to, or with the correctness of the said inventory, When the Surrogate Registrar of the county in which any property subject to the payment of the said duty is situate shall, at the instance of the Provincial Treasurer, his solicitor or agent, direct in writing that the sheriff of the county shall make a valuation and appraise the said property, and also appraise any property alleged to have been improperly omitted from the said inventory. appraise-ment by sheriff may be directed

7. In such case the sheriff shall forthwith give due and sufficient written notice to the executors and administrators and to of property such other persons as the Surrogate Registrar may by order direct of the time and place at which he will appraise the property, included in the inventory, or any property which, in the opinion of the Provincial Treasurer, his solicitor or agent, should be included therein, and shall appraise the same accordingly at its fair market value, and make a report thereof in writing to the Surrogate Registrar, together with such other facts in relation thereto as the Valuation of property by sheriff.



Rev. Stat., c. 19. Surrogate Registrar may by order require, and such report shall be filed in the office of the Surrogate Registrar, and for the purposes of the said enquiry and appraisement the said sheriff shall have all the powers which may be conferred upon commissioners under the Act respecting Inquiries Concerning Public Matters. The sheriff shall be entitled to receive the sum of \$5 per diem for services performed under this Act, and his actual and necessary travelling expenses, and the same shall be paid to him by the Treasurer of the Province.

Mode of  
assessing  
property  
liable to  
duty.

8. Where the Provincial Treasurer, his solicitor or agent, and the other parties interested do not agree thereon, the Surrogate Registrar shall assess and fix the cash value at the date of the death of the deceased of all estates, interests, annuities and life estates or terms of years growing out of such estate, and the duty to which the same is liable, and shall immediately give notice thereof, by registered letter, to such parties as by the rules of the High Court would be entitled to notice in respect of like interests in an analogous proceeding; and the Surrogate Registrar may appoint for the purpose of this Act a guardian for infants who have no guardians; and the value of every future or contingent or limited estate, income or interest in respect of which the duty is payable at the death of the deceased, either by the terms of this Act or by arrangement made under sub-section 3 of section 11, shall, for the purposes of this Act, be determined by the rule, method and standards of mortality and of value, which are employed by the Provincial Inspector of Insurance in ascertaining the value of policies of life insurance and annuities, for the determination of the liabilities of life insurance companies, save that the rate of interest to be taken for the purpose of computing the present value of all future interests and contingencies shall be five per centum per annum; and the Inspector of Insurance shall, on the application of any Surrogate Registrar, determine the value of such future or contingent or limited estate, income or interest, upon the facts contained in such application, and certify the same to the Surrogate Registrar, and his certificate shall be conclusive as to the matters dealt with therein.

Appeal  
from  
appraise-  
ment or  
assessment

9. Any person dissatisfied with the appraisement or assessment may appeal therefrom to the Surrogate Judge of the proper county within thirty days after the making and filing of such assessment, and upon such appeal the said Judge shall have jurisdiction to determine all questions of valuation and of the liability of the appraised estate or any part thereof for such duty, and the decision of the Surrogate Judge shall be final, unless the property in respect of which such appeal is taken shall exceed in value the sum of \$10,000, when a further appeal shall lie from the decision of the

Surrogate Judge to a Judge of the High Court and from such Judge of the High Court to the Court of Appeal, whose decision shall be final.

10. Where a bequest or devise of property, which otherwise would be liable to the payment of duty under this Act, is made to an executor or trustee in lieu of commission or allowance, and said bequest or devise exceeds what would be a reasonable compensation for the services of the executor or trustee, such excess shall be liable to said duty, and the Judge of the Surrogate Court having jurisdiction in the case shall fix such compensation.

Requests to executors or trustees.

11.—(1) In all cases where there has been a devise, descent or bequest of property liable to succession duty, to take effect in possession, or to come into actual enjoyment after the expiration of one or more life estates or a period of years, the duty on such future estate or interest shall not be payable, nor interest begin to run thereon, until the person or persons liable for the same shall come into actual possession of such estate or interest, by the determination of the estate or estates for life or years, and the duty shall be assessed upon the value of the estate or interest at the time the right of possession accrues as aforesaid.

When duty payable on future estates and interests.

(2) Provided that where no person is entitled to the present enjoyment of such property or the income thereof, or where there is some part of such property or income to the present enjoyment of which no person is entitled, the duty on such property or income, or such part of such property or income, shall be payable as in section 12 is provided.

Where no person is entitled to present enjoyment of the property.

(3) Notwithstanding the duty may under this section not be payable until the time when the right of possession or actual enjoyment accrues, any executor, administrator, guardian, or trustee, or person owning a prior interest, when such executor, administrator, guardian, or trustee, or person has the custody or control of the property, may agree upon or commute for a present payment out of the property in discharge of the said duty; and the Treasurer of the Province may, upon the application of any such person, commute the succession duty which would or might, but for the commutation, become payable in respect of such interest, for a certain sum to be presently paid, and for determining that sum shall cause a present value to be set upon such duty, regard being had to the contingencies affecting the liability to and rate and amount of such duty and interest; and on the receipt of such sum the Treasurer shall give a certificate of discharge for such duty.

Commuting duties on future estates or interests.

(4) Provided that the duty chargeable upon any legacy given by way of annuity, whether for life or otherwise, shall be paid by four equal payments, the first of which payments of duty shall be made before or on completing payment of the first year's annuity.

When duties on annuities to be paid.

and the three others of such payments of duty shall be made in like manner successively, before or on completing the respective payments of the three succeeding years' annuity respectively. In case the annuitant dies before the expiration of the said four years only payment of instalments which fall due before his death shall be required.

Further  
time may  
be granted.

(5) The duty is to be paid on the cash value of all estates, interests, annuities and life estates, or terms of years mentioned in section 8 of this Act, in the same manner as on the other assets of the estate; but the Judge may grant further time for payment thereof, or of a part thereof, where it appears to the Judge that having reference to the condition of the estate, the available means of making such payment, and the interest of others, that payment within the time prescribed by this Act would be unreasonable or unjust; in such cases as between executors or administrators of the estate and the person who is to become entitled to the possession or enjoyment at a future period only, the duty payable and paid by the executors or administrators in respect of such future estate or interest shall be a charge on such future estate or interest, and shall be paid to them by the person aforesaid with interest at the time the estate or interest comes into actual possession; but the executors or administrators shall be entitled to receive the amount, or any part thereof, at an earlier date if the person to pay desires to pay the same at an earlier date.

Duties to  
be payable  
within 18  
months  
from death  
of owner.

12.—(1) The duties imposed by this Act, unless otherwise herein provided for, shall be due and payable at the death of the deceased, or within eighteen months thereafter, and if the same are paid within eighteen months no interest shall be charged or collected thereon, but if not so paid interest at the rate of six per centum per annum from the death of the deceased shall be charged and collected, and such duties together with the interest thereon shall be and remain a lien upon the property in respect to which they are payable until the same is paid.

Certificate  
of dis-  
charge to  
be given  
by Provin-  
cial Treas-  
urer.

(2) The Treasurer of the Province, on being satisfied that the full amount of succession duty has been or will be paid in respect of an estate or any part thereof, shall, if required by the person accounting for the duty, give a certificate to that effect, which shall discharge from any further claim for succession duty the property shown by the certificate to form the estate, or such part thereof, as the case may be.

Certificate  
not a dis-  
charge in  
case of  
fraud, etc.

(3) Such certificate shall not discharge any person or property from succession duty in case of fraud or failure to disclose material facts, and shall not affect the rate of duty payable in respect of any property afterwards shown to have passed on the death, and the duty in respect of such property shall be at such rate as would be

payable if the value thereof were added to the value of the property, in respect of which duty has been already accounted for.

(4) Provided, however, that a certificate purporting to be a discharge of the whole succession duty payable in respect of any property included in the certificate shall exonerate from the duty a bona fide purchaser for valuable consideration without notice, notwithstanding any such fraud or failure.

13. The Surrogate Judge may make an order upon the application of any person liable for the payment of said duty, extending the time fixed by law for payment thereof where it appears to such Judge that payment within the time prescribed by this Act is impossible owing to some cause over which the person liable has no control.

14. Any administrator, executor or trustee having in charge or trust any estate, legacy or property subject to the said duty shall deduct the duty therefrom, or collect the duty thereon upon the appraised value thereof from the person entitled to such property, and he shall not deliver any property subject to duty to any person until he has collected the duty thereon.

15. Executors, administrators and trustees shall have power to sell so much of the property of the deceased as will enable them to pay the said duty in the same manner as they may by law do for the payment of debts of the testator or intestate.

16. Every sum of money retained by an executor, administrator or trustee, or paid into his hands for the duty on any property, shall be paid by him forthwith to the Treasurer of the Province, or as he may direct.

17. Where any debts shall be proven against the estate of a deceased person, after the payment of legacies or distribution of property from which the duty has been deducted, or upon which it has been paid, and a refund is made by the legatee, devisee, heir or next of kin, a proportion of the duty so paid shall be repaid to him by the executor, administrator or trustee, if such duty has not been paid to the Treasurer of the Province, or by the Treasurer if it has been so paid.

18. If it appears to the Surrogate Judge that any duty accruing under this Act has not been paid according to law, he shall make an order directing the persons interested in the property liable to the duty to appear before the Court on a day certain to be therein named and show cause why said duty should not be paid. The service of such order and the time, manner and proof thereof, and fees therefor, and the hearing and determining thereon, and the enforcement

of the judgment of the Court thereon shall be according to the practice in or upon the enforcement of a judgment of the High Court.

**Costs.** 19. The costs of all such proceedings shall be in the discretion of the Court or Judge, and shall be upon the County Court scale unless and until another tariff shall be provided, save as to the costs of an appeal, and then upon the scale of the Court appealed to.

**Limitation of actions.** 20. Any action, matter or proceeding by or against the Province in respect of duties or claims arising upon or out of any succession, shall be commenced within six years from the time when such duties or claims became payable.

**Fees of Judges and Registrars.** 21. The Judges and Registrars of the several Surrogate Courts shall be entitled to take for the performance of duties and services under this Act, similar fees to those payable to them under and by virtue of the Surrogate Courts Act, and the Surrogate Court rules Rev. Stat., for similar proceedings, and section 83 of such Act shall apply to the c. 59. fees payable under this Act to the Surrogate Judge.

**Lieutenant-Governor in Council makeregulations.** 22. The Lieutenant-Governor in Council may make regulations for carrying into effect the provisions of this Act, and such regulations shall be laid before the Legislative Assembly forthwith, if the Legislature is in session at the date of such regulations, and if the Legislature is not in session such regulations shall be laid before the House within the first seven days of the session next after the same are made.

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## APPENDIX VIII.

## ONTARIO STATUTES 1899, c. 9.

## Act amending Succession Duties Act.

**H**ER MAJESTY, by and with the advice and consent of the  
Legislative Assembly of the Province of Ontario, enacts as  
follows:—

1. Any sum payable under *The Succession Duty Act* shall be recoverable with full costs of suit as a debt due to Her Majesty from any person liable therefor by action in any court of competent jurisdiction and it shall not in any case be necessary to take the proceedings authorized by sections 6 to 10 of the said Act. Recovery of succession duties under Rev. Stat. c. 24, by action.
2. The High Court shall also have jurisdiction to determine what property is liable to duty under the said Act, the amount thereof and the time or times when the same is payable, and may itself or through any referee exercise any of the powers which by the said sections 6 to 10 are conferred upon any officer or person. Matters to be determined by High Court in action.
3. Subject to the discretion of the Court as to costs, an action may be brought for any of the purposes in this Act mentioned notwithstanding the time for the payment of the duty has not arrived. Action may be brought before time for payment of duty.
4. In every such action Her Majesty's Attorney-General shall have the same right either before or after the trial to require the production of documents, to examine parties or witnesses or to take such other proceedings in aid of the action as a plaintiff has or may take in an ordinary action. Production of documents, examination, etc.
5. Where for the better determining any question raised in any such action the Court deems it advisable to order the trial of an issue or issues it may give such directions in that behalf as it deems expedient. Ordering trial of issues.
6. In case the Court shall think fit at any time to direct a reference such reference need not be to a surrogate court registrar or to a sheriff but may be to an officer of the Court as provided by *The Judicature Act*. Reference.
7. An appeal shall lie in an action brought under this Act wherever an appeal would lie if the action were between subject and subject and to the like tribunal. Appeals in actions under Act.

Declaration as to liability of property transferred before death.

8. Where any property which has, previous to the death of a person whose estate is subject to duty, been conveyed or transferred to some other person is declared liable to duty the Court may declare the duty to be a lien upon the property and may make such declaration although the amount of such duty has not been ascertained, and where any property which, had it remained in the hands of the person to whom or for whose benefit it was conveyed or transferred by such deceased person, would have been liable to duty, has been conveyed or transferred to any purchaser for valuable consideration, the Court may direct the person to whom or for whose benefit the said property was conveyed or transferred by such deceased person as aforesaid to pay the amount of the duty to which such property would have been subject as aforesaid.

Registration of caution.

9. In case it is claimed that any land or money secured by any mortgage or charge upon land is subject to duty the Provincial Treasurer or the Solicitor to the Treasury acting in his behalf may when deemed necessary cause to be registered in the proper registry office, or if the land is registered under *The Land Titles Act* in the proper office of land titles, a caution stating that succession duty is claimed by the Provincial Treasurer in respect of the said land, mortgage or charge on account of the death of the deceased, naming him, and any subsequent dealing with such land, mortgage or charge shall be subject to the lien for such duty, but nothing herein contained shall affect the rights of the Crown to claim a lien independently of the said caution.

Rev. Stat. c. 138.

Retrospective operation of preceding provisions  
Rev. Stat. c. 24, s. 4 amended.

10. The preceding sections shall apply to the estates of all persons in respect of which the duty is claimed whether such persons have died before or shall die after the passing of this Act.

Property of which deceased was competent to dispose liable to duty.

11. Section 4 of *The Succession Duty Act* is amended by inserting the following as clauses (g) and (h) of sub-section 1.

(g) Any property of which a person dying after the coming into force of this section was at the time of his death competent to dispose; and a person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general or limited power as would if he were *sub jure* enable him to dispose of the property as he thinks fit or to dispose of the same for the benefit of his children or some of them, whether the power is exercisable by instrument *inter vivos* or by will or both, including the power exercisable by a tenant in tail whether in possession or not but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself or as mortgagee. A disposition taking effect out of the interest of the person so dying shall be deemed to have been made by him whether the concurrence of any other person was or was not required. Money which a person has a general power to charge on property shall be deemed to be property of which he has the power to dispose.

Imp. Act. 57-58 Vict. c. 30, s. 2 (a), and s. 22 (2).

(b) An estate in dower or by the curtesy in any land of the person so dying to which the wife or husband of the deceased becomes entitled on the decease of such person.

Estates in dower or by curtesy. Imp. Act, 57-58 Vict. c. 30 s. 22, (3).

**12.** In determining for the purposes of sub-sections 3 to 6 of section 4 of *The Succession Duty Act* the aggregate value of the property of any person dying after this section takes effect, the value of his property situate outside of this Province shall be included as well as the value of the property situate within this Province.

Aggregate value of estate — property out of province to be included.

**13.** No foreign executor or administrator shall assign or transfer any stocks or shares in this Province standing in the name of a deceased person or in trust for him which are liable to pay succession duty until such duty is paid to the Treasurer of the Province or security given as required by section 5 of the said Act and any corporation allowing a transfer of any stocks or shares contrary to this section shall be liable to pay the duty payable in respect thereof.

Foreign executors, etc., not to transfer stocks, etc., until duty paid.

**14.** Section 8 of *The Succession Duty Act* is amended by substituting the word "four" for the word "five" in the twenty-third line thereof.

Rev. Stat. c. 24, s. 8, amended.

**15.** The remedies herein provided shall be in addition to those provided by *The Succession Duty Act*.

Remedies to be in addition to those under Rev. Stat. c. 24.



## APPENDIX IX.

GOVERNMENT REGULATIONS AND FORMS  
UNDER SUCCESSION DUTIES ACT.

1. The words "aggregate value" occurring in the Act are to be construed as meaning the aggregate value of the property after payment of all debts and expenses of administration, in the same manner as the word "value" is used in the Act.

2. All succession duties are to be paid to the Treasurer of the Province of Ontario for the time being.

3. No duty is to be payable in the following cases:—

- (a) Where the value of the property does not exceed \$10,000.
- (b) On property given, devised or bequeathed for religious, charitable or educational purposes.
- (c) Property passing to parties mentioned in section 3, s.-s. 3, of the Act, where the value does not exceed \$100,000.
- (d) Where bequest or devise does not exceed \$200, although value of property exceeds \$10,000.

4. The succession duties payable are as follows:—

- (a) Where the property passes to, or for the use of the parties named in section 4 of the Act, s.-ss. 1 and 2;  
If aggregate value exceeds \$100,000, \$2.50 on each \$100 of the whole value.  
If aggregate value exceeds \$200,000, \$5 on each \$100 of the whole value.
- (b) Where the property passes to or for the benefit of the parties named in section 4, s.-s. 3 of the Act, and the aggregate value exceeds \$10,000, \$5 on every \$100 of the whole value.
- (c) Where the property passes to or for the benefit of the parties named in section 4, s.-s. 4 of the Act, and the aggregate value exceeds \$10,000, \$10 on every \$100 of the whole value.

5. Where the estate left by the deceased does not exceed \$200,000, and the same passes in various amounts to parties named in section 4, s.-ss. 1, 3 and 4 of the Act, the succession duties payable on each amount respectively will be as in paragraph 4 hereof. Thus, if the aggregate value of the estate is \$150,000, of which say \$50,000 passes to parties named in s.-s. 1, there will be \$2.50 duty payable

in respect of each \$100 of this \$50,000; and if the second \$50,000 passes to parties named in s.-s. 3, there will be \$5 duty payable on each \$100 of this \$50,000; and if the third \$50,000 passes to parties named in s.-s. 4, there will be \$10 duty payable on each \$100 of this \$50,000; and so on according to the amounts passing to the various classes of persons specified.

In case the aggregate value of the whole property left by the deceased exceeds \$200,000, the duty payable by the parties named in s.-s. 1 will be \$5 for every \$100, instead of \$2.50 as above mentioned.

#### REGULATIONS BY THE LIEUTENANT-GOVERNOR IN COUNCIL.

1. The principal in the bond under section 5 of the Succession Duty Act shall be bound in the whole amount; and the sureties in such bond are required to justify each in an amount equal to the sum for which he is to be liable, and the aggregate shall equal the amount of the penalty of the bond.

2. One week's notice of valuation and appraisal under section 7 of the Act to all the parties interested, or their solicitors or agents, before proceeding therewith, shall prima facie be considered sufficient notice.

3. All appointments of a guardian by the registrar must be made with the privity and consent of the official guardian.

4. The fees payable under section 20 (now section 21) of the Act shall be the same as those payable in contentious matters under the Surrogate Courts Act.

5. The subjoined forms are to be followed as nearly as the circumstances of each case allow.

#### FORM 1.

#### BOND BY EXECUTORS OR ADMINISTRATORS

##### *The Succession Duty Act.*

#### IN THE SURROGATE COURT OF THE COUNTY OF

In the matter of the estate of A. B., deceased.

Know all men by these presents that we, C. D., of the  
of \_\_\_\_\_, in the county of \_\_\_\_\_, E. F. of the \_\_\_\_\_ of \_\_\_\_\_, in  
the county of \_\_\_\_\_, G. H. of the \_\_\_\_\_ of \_\_\_\_\_, in the county  
of \_\_\_\_\_, are jointly and severally bound unto Her Majesty the  
Queen in the sum of \$ \_\_\_\_\_, to be paid to the Treasurer of the  
Province of Ontario for the time being, for which payment well  
and truly to be made we bind ourselves and each of us for the

## EXECUTORS AND ADMINISTRATORS.

whole, and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals. Dated the            day of            , in the year of our Lord 19    .

The condition of this obligation is such that if the above named C. D., the administrator of all the property (or as the case may be) of A. B., late of the            of            , in the county of            , deceased, who died on or about the            day of            , A.D. 19    , do well and truly pay or cause to be paid to the said Treasurer of the Province of Ontario for the time being, representing Her Majesty the Queen in that behalf, any and all duty to which the property, estate and effects of the said A. B. coming into the hands of the said C. D. may be found liable under the provisions of the Succession Duty Act, within eighteen months from the date of the death of the said A. B., or such further time as may be given for payment thereof under section 13 of the Succession Duty Act, then this obligation shall be void and of no effect, otherwise the same to remain in full force and virtue.

Signed, sealed and delivered in  
the presence of            .

## FORM 2.

## AFFIDAVIT OF VALUE AND RELATIONSHIP.

*The Succession Duty Act.*

## CANADA,

## IN THE PROVINCE OF ONTARIO.

## IN THE SURROGATE COURT OF THE COUNTY OF            .

In the matter of the estate of A. B., deceased.

I,            , of the            of            , in the county of            , make oath and say:—

1. That I am the party applying for letters            to the estate of the above named A. B.

2. That I have caused to be filed in the office of the registrar of the above named Court a petition praying that letters be granted by said Court to me of the estate of the said A. B.

3. That I have made diligent enquiry and search as to the value of the property which the said A. B. died seised or possessed of or entitled to.

4. That the paper writing hereunto annexed marked "A," is an itemized inventory and true and correct statement of the property which the said A. B. died seised or possessed of or entitled to, and of the market value thereof, and the amount and value of the debts due to him.

5. That the paper writing hereunto annexed marked "B," contains a true and correct list of all the persons to whom the said property will pass, and the degree of relationship in which each of them stand to the said deceased, together with their addresses, so far as I can ascertain them.

6. That to the best of my knowledge, information and belief, the said                      did not voluntarily transfer by deed, grant or gift, made in contemplation of his death, or made or intended to take effect in possession or enjoyment after his death, any property or any interest therein or income therefrom, to any person in trust or otherwise, or by reason whereof any person has or shall become beneficially entitled in possession or expectancy in or to the said property or income thereof.

Sworn before me at the  
of                      , in the county  
of                      , this  
day of                      , A.D. 19                      }

A Commissioner, etc.

FORM 3.

DIRECTION TO SHERIFF TO MAKE VALUATION.

*The Succession Duty Act.*

IN THE SURROGATE COURT OF THE

In the matter of the estate of A. B., deceased.  
To the Sheriff of the                      County of

At the request of the Treasurer of the Province of Ontario, I hereby direct that you do make a valuation and appraisement of all property of the deceased, and report to me the result of such valuation and appraisement forthwith after making the same.

Dated at                      , this                      day of                      , A.D. 19                      .

FORM 4.

NOTICE BY SHERIFF.

*The Succession Duty Act.*

IN THE SURROGATE COURT OF THE

In the matter of the estate of A. B., deceased.  
To

Take notice that by an order made by the registrar of the Surrogate Court, of the                      on the                      day of                      , 19                      , I have been

## EXECUTORS AND ADMINISTRATORS.

directed to make a valuation and appraisalment of the property which the said A. P. died seised or possessed of or entitled to, and further take notice that pursuant to the said order, I will on the       day of       , at       of the clock, in the       noon, at       , proceed to make such valuation and appraisalment, of which all parties are required to take notice and govern themselves accordingly.

Dated the       day of       , A.D. 19       .

C. D.,  
Sheriff of the County of

## FORM 5.

## REPORT OF SHERIFF.

In the matter of the estate of A. B., deceased.

To the Judge of the said Surrogate Court:

Pursuant to an order made in this matter and dated the day of       , A.D. 19       , directing me to make a valuation and appraisalment of the property which the above named deceased died possessed or seised of or entitled to, having duly notified all parties (or as the case may be) entitled thereto, I proceeded in the presence of       to make an appraisalment and valuation of said property at its fair market value, and do value and appraise the same at the sum of \$       , as appears from the schedule hereto annexed.

Dated at       , this       day of       , A.D. 19       .

C.D.,  
Sheriff of

## FORM 6.

## CERTIFICATE OF INSPECTOR OF INSURANCE.

IN THE SURROGATE COURT OF THE

*The Succession Duty Act.*

In the matter of the estate of A. B., deceased.

To the Surrogate Registrar of the above Surrogate Court:

I,       , of       , Provincial Inspector of Insurance, having been applied to by       , the Surrogate Registrar of this Court,

to determine the value of \_\_\_\_\_, and having determined such value, in accordance with the provisions of section 8 of the above Act, hereby certify to the said registrar the said values as follows:—

Dated at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, A.D. 19 \_\_\_\_\_.

J. D.,

Provincial Inspector of Insurance.

---

FORM 7.

ORDER OF JUDGE. (Section 19).

*The Succession Duty Act.*

IN THE SURROGATE COURT OF THE

In the matter of the estate of A. B., deceased.

It appearing to me that there is duty unpaid accruing under the Succession Duty Act, in respect of the property of the above deceased, and that the same has not been paid, I do hereby order and direct that \_\_\_\_\_ do appear before this Court at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_, at \_\_\_\_\_ of the clock in the \_\_\_\_\_ noon, to show cause why he should not forthwith pay to the Treasurer of the Province of Ontario the sum of \_\_\_\_\_, being duty payable to said Treasurer in respect of the property of the above deceased under the said the Succession Duty Act, and why such payment should not be enforced according to the practice in or upon the enforcement of a judgment of the High Court.

---

FORM 8.

*The Succession Duty Act.*

BOND BY REGISTRAR. (R. S. O. 1897, c. 59, s. 12.)

Know all men by these presents, that we \_\_\_\_\_ are held and firmly bound unto our Sovereign Lady Queen Victoria, her heirs and successors, in manner and in sums following, that is to say, the said \_\_\_\_\_ in the sum of \_\_\_\_\_ dollars of lawful money of Canada, the said \_\_\_\_\_ in the sum of \_\_\_\_\_ dollars of like lawful money; and the said \_\_\_\_\_ in the sum of \_\_\_\_\_ dollars of like lawful money, to be paid to Our Sovereign Lady the Queen, her heirs and successors; for which payments, to be well and faithfully

made, we severally, and not each for the other, bind ourselves, our heirs, executors and administrators, and each of us binds himself, his heirs, executors and administrators, firmly by these presents.

Scaled with our seals and dated this            day of            in the year of Our Lord one thousand nine hundred and

Whereas the above bounden           , as registrar of the Surrogate Court of the            Count of           , has been required pursuant to the Succession Duty Act, to give security for the due and punctual performance of duties imposed upon him by the said Act, and that he will not receive any duty payable under the said Act. Now the condition of this obligation is such, that if the said

shall duly and punctually perform the duties imposed upon him by the Succession Duty Act, and shall not receive any duty payable under the said Act, then this obligation to be null and void; otherwise to remain in full force, virtue and effect.

Signed, sealed and delivered

In the presence of

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